TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 1994

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Treasury, Postal Service, and Gener...

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS

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C. WILLIAM SMITH, ELIZABETH A. PHILLIPS, ROBYN C. BASON, and JENNIFER MUMMERT, *Staff Assistants*

WHITE HOUSE PERSONNEL PRACTICES

FOLLOW-UP TO HEARING ON ATF ACTIONS DURING WACO, TEXAS, RAID

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TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS FOR 1994

FRIDAY, OCTOBER 22, 1993.

WHITE HOUSE PERSONNEL PRACTICES

GAO WITNESSES

NANCY R. KINGSBURY, DIRECTOR, FEDERAL HUMAN RESOURCE MANAGEMENT ISSUES, GENERAL GOVERNMENT DIVISION

JAMES F. HINCHMAN, GENERAL COUNSEL

MICHAEL R. VOLPE, ASSISTANT GENERAL COUNSEL

WHITE HOUSE, OFFICE OF ADMINISTRATION WITNESSES

PATSY THOMASSON, SPECIAL ASSISTANT TO THE PRESIDENT, AND DIRECTOR OF THE OFFICE OF ADMINISTRATION

JOHN CRESSMAN, ASSISTANT DIRECTOR, OFFICE OF ADMINISTRATION

CHAIRMAN'S OPENING STATEMENT

Mr. HOYER. This hearing will come to order.

We will have two hearings today, both of which are follow-ups to previous discussions we have had in this Committee. This morning will be the conclusion of the discussions we have had with regard to the White House personnel policies during the Transition. The second hearing will be on the tragedy that occurred at Waco, the subsequent report issued by the Treasury Department, and the current status of plans at Treasury as they move forward with ATF.

This morning we welcome Ms. Nancy Kingsbury, Director, Federal Human Resource Management Issues of the General Accounting Office. She is here to respond to questions concerning a September 1993 General Accounting Office report entitled, "Retroactive Appointments and Pay Adjustments in the Executive Office of the President."

Ms. Kingsbury, we will place your prepared text at the appropriate place in the record and ask that you proceed to summarize your statement.

I would say at the outset that I have had the opportunity of reading in full the GAO report. I was pleased to see that its analysis of the bottom line was that no illegal activity occurred. In fact the GAO analysis was that under the Federal law, in particular Title 3 of the U.S. Code, the actions were taken within the authority of the executive office of the President. That was my initial premise, and I am pleased that that premise is supported by GAO findings.

This hearing is the result of a request made by Mr. Lightfoot, Mr. Wolf and Mr. Istook, for a GAO study, and the subsequent request that Mr. Lightfoot made of me to have a follow-up hearing once the GAO's work was complete. I thought that appropriate, and I am pleased to have accommodated Mr. Lightfoot in that regard. I would like to recognize Mr. Lightfoot at this time.

Mr. LIGHTFOOT. Thank you, Mr. Chairman. I really appreciate you calling the hearing at my request.

A lot of times around here there is a lot of "my friend and the gentleman from So-and-so," and all that, and I don't think there is a great deal of sincerity to some of it, but I would really like to say to you that I very sincerely appreciate your cooperation on this matter. Having spent eight years here with our party in the House, I can also appreciate the position that you are in at this point in time, and you have been very forthright with us, and it is very much appreciated, the cooperation we have had from you in putting this together.

I would also like to thank the folks who are here this morning and will be throughout the morning.

I would like to make a point before we get into it that I don't want anyone to see this as some kind of partisan attack. As Ms. Kingsbury, I think, knows and some of the other folks at GAO, we got into this because Federal employees felt uncomfortable with what they were being asked to do and basically came to us at some risk to themselves asking that we ask some questions. That is really how it all got started.

But at the same time I think there is a role we have to play as a minority. With both the Congress and the White House being dominated by the same party, someone has to be the devil's advocate. We have the job of maintaining oversight on how and why the taxpayers' funds are being spent. I did support our appropriations bill which gave the White House an increase in the budget for fiscal year 1994.

I also would like to mention that the President is a busy man. He has a lot of demands on his time. And I don't believe he has personal involvement or knowledge of many of the things that take place under his watch. I couldn't guarantee you of everything that takes place in my office. But it is not in any way meant to demean him, but he has more important things to do than worry about what the payroll looks like. Those decisions he rightly entrusts to his staff. But I also believe he must be able to trust his staff to make decisions which reflect well on him, in this case.

So, again, Mr. Chairman, thank you very much for holding this hearing. As you have mentioned, it is a follow-up on the GAO study, and I think we would be best served if we got to the questions.

Mr. HOYER. At this time, I would like to recognize Mr. Darden of Georgia, a Member of our Subcommittee.

Mr. DARDEN. Thank you very much, Mr. Chairman. I am pleased to be here this morning. I want to thank you for convening the hearing.

I have also reviewed the report and was particularly interested to find out that Title 3 of U.S. Code I think resolves a matter in which the President is given unfettered authority over the White

House. But I would also point out that subject to our own internal controls, we as Members of Congress have total control over our payroll, including retroactivity. We can make such adjustments as have been made here.

So I think we need to realize that under our system of government and coequality of the branches, while the President must have total authority over his situation within certain restrictions, we have the same over ours.

My investigation reveals that any Member of Congress, subject to approval of the House Administration Committee, could conduct any practice such as what the White House did. So what I think is good for one branch is good for another.

With that, I am pleased to be here and participate in this hearing.

Mr. HOYER. Thank you.

Mr. Olver, do you wish to make any comments?

Mr. OLVER. No.

Mr. HOYER. We are pleased to hear from you, Ms. Kingsbury. If you would introduce your colleagues for the record, and then proceed in such manner as you deem to be appropriate.

SUMMARY STATEMENT OF MS. KINGSBURY

Ms. KINGSBURY. Thank you very much, Mr. Chairman. I am happy to be here this morning and I have with me Jim Hinchman, who is the general counsel of the General Accounting Office, and Michael Volpe, who works for Jim and was the lawyer perhaps most closely associated with the analysis that we did in this work.

As you have already mentioned, Mr. Chairman, in April this year Representatives Lightfoot, Istook and Wolf from this subcommittee did ask us to make this investigation, and we did issue a report on September 9th. It is important to emphasize that the personnel actions in question took place under one of two employment authorities, either Title 5 or Title 3. With respect to the Title 5 cases we reviewed them and found them well within the decisions that we have already issued affecting Title 5. We had never done any analysis of Title 3 cases before. Title 3 is, as you said, very broad.

In fact, I would like to quote it. It says, "The President is authorized to appoint and fix the pay of employees in the White House office without regard to any other provision of law regulating the employment or compensation of persons in government service."

We emphasized that underscored language in our statement because it is central to the analysis of the personnel actions in question. In our report, we point out that we examined 611 appointments and found 230 of them had been made retroactively. These retroactive appointments involved retroactive salary appointments totaling just under $336,000.

We also identified several salary adjustments: 22 increases and 8 decreases. These were also made retroactively. These were among a total of 58 pay increases and 11 pay decreases that we identified. Each of these was specifically analyzed. We obtained documentation from the White House about the reasons for each one of these cases.

And at the bottom line—I think we can probably move directly to the questions—we found for reasons specific to the cases or in

general because of the broad authority of Title 3, that these actions were in fact legal. We also identified a number of other instances of irregular personnel actions, but the White House responded immediately by taking care of those. So that was not a particular problem.

We further investigated the question of whether some of the White House employees involved had been paid for both their services at the White House and their services as employees of the transition. We did determine that 25 of those employees had been in effect doubly paid for a period of time. The General Services Administration is now seeking repayments from those employees for those errors.

So with that, I would like to go directly to questions.

[The written statement and report follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Treasury, Postal Service and General Government
Committee on Appropriations
House of Representatives

For Release on Delivery
Expected at
9:30 a.m. EDT
Friday
October 22, 1993

PERSONNEL PRACTICES

Retroactive Appointments and Pay Adjustments in the Executive Office of the President

Statement of
Nancy R. Kingsbury, Director,
Federal Human Resource Management Issues,
General Government Division

GAO/T-GGD-94-32

Retroactive Appointments and Pay Adjustments in the Executive office of the President

Summary of Statement by
Nancy R. Kingsbury
Director, Federal Human Resource Management Issues

Earlier this year, allegations surfaced concerning the backdating of White House appointments and salary adjustments. In response to a request from Representatives Lightfoot, Istook, and Wolf of the House Appropriations Subcommittee on Treasury, Postal Service and General Government, GAO investigated these and other personnel issues.

Two hundred and thirty White House appointments and 22 salary increases were made retroactively during the period from January 20 through April 24, 1993. Although retroactive, these appointments and salary adjustments were legal. With respect to the retroactive appointments, GAO has long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision. With respect to the retroactive salary increases, GAO decisions and case law generally hold that such personnel actions may be made retroactively only under certain limited exceptions, such as clerical or administrative errors. These exceptions covered 2 of the 22 cases in question.

The remaining 20 retroactive salary increases involved employees appointed under title 3 of the U.S. Code, the personnel law which governs many appointments in the White House. Title 3 gives the President authority to set pay for title 3 employees "without regard to any other provision of law regulating the employment or compensation of persons in the Government service." GAO found no basis to conclude that the salary increases covered by this authority were illegal. However, since this interpretation of the law appears to leave room for abuse, GAO believes that the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority with respect to retroactive pay adjustments.

GAO also identified several irregular personnel and pay actions, including the double payment of 25 employees by the White House and the Presidential transition team, the improper advancement of annual leave, the retention of an employee on the payroll after the expiration of a temporary appointment, and several salary overpayments.

Mr. Chairman, Representative Lightfoot, and Members of the Subcommittee:

We are pleased to be here this morning to provide information about our review of certain personnel and pay actions in the Executive Office of the President (EOP). You asked us to summarize our findings, with particular emphasis on the basis for our conclusions about the propriety of the actions.

BACKGROUND

As you know, in April of this year, Representatives Lightfoot, Istook, and Wolf of this Subcommittee asked us to investigate certain allegations reported to them concerning the backdating of White House appointments and salary adjustments. We provided some preliminary information in May, prior to this Subcommittee's markup of the White House's fiscal year 1993 supplemental appropriation request. We continued to inquire into these and other related matters, including whether White House officials required to file financial disclosure reports had done so in a timely manner, and whether certain White House employees had received compensation from the Presidential transition during the same period they were employed in the White House.

We issued a report on the results of our work on September 9, 1993.[1] On September 14, 1993, Representative Lightfoot provided 17 additional questions related to our work. We responded to those questions by correspondence dated October 8, 1993.[2]

The personnel actions in question were taken under one of two statutory employment authorizations. Some involved appointments or pay adjustments under title 5, U.S. Code, the personnel law which governs most appointments in the executive branch and contains specific requirements relating to the pay and position classification of employees. Most of the appointments and pay adjustments we examined involved positions authorized under title 3, U.S. Code. While title 3 contains certain limits on the numbers of appointments that are authorized at upper salary levels, it also provides in pertinent part as follows:

> "(T)he President is authorized to appoint and fix the pay of employees in the White House Office <u>without regard to any other provision of law regulating the employment or compensation of persons in the Government service</u>."

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[1]<u>Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President</u>, (GAO/GGD-93-148, Sept. 9, 1993).

[2]<u>EOP Personnel Practices</u>, (GAO/GGD-94-16R, Oct. 8, 1993).

We emphasize the underscored language because it is central to our analysis of the personnel actions in question.

As agreed with the requesters' staffs, we reviewed all of the appointments and salary adjustments that were effective between the start of the Administration on January 20, 1993, and the end of the ninth 2-week pay period in the current EOP payroll year, which was April 24, 1993.[3] We also reviewed certain personnel actions outside that time frame which came to our attention during the course of our work.

RETROACTIVE PERSONNEL ACTIONS

We found that a number of personnel actions, including appointments and salary adjustments, were made retroactive to dates from one to several pay periods earlier than the dates on which the actions were processed. The 230 retroactive appointments we identified involved individuals in a variety of EOP offices and at varying salary levels.

The 30 retroactive salary adjustments--22 increases and 8 decreases--also affected individuals from a variety of White House offices. We discussed all of the retroactive salary

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[3]In total we examined 611 appointments effective during this period, of which 230 were retroactive, that is, made effective on a date at least one pay period earlier than the date of the action. We also examined 69 instances of salary increases or decreases, of which 30 were retroactive.

adjustments with White House officials and obtained pertinent documentation which supported their explanations for these adjustments. It should be noted that the retroactive payments we examined involved relatively modest amounts of money. The largest involved an additional payment of $3,720, while most were less than $400.

Under title 5, retroactive appointments and salary adjustments occasionally occur in executive branch agencies, and we have issued a number of decisions which set forth the limited circumstances in which we believe retroactive actions are appropriate. With respect to retroactive appointments, we have long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision. When an employee begins work, based on a decision by an appointing official, and performs his or her duties in good faith without fraud for a period prior to the implementation of his or her appointment in an agency's personnel system, the employee is considered to be a de facto employee and may be paid for the services performed. We found that both the title 5 and title 3 appointments we reviewed met this basic test.

With respect to salary increases, our decisions and numerous court cases, mostly involving title 5 employees, have generally held that a personnel action such as a salary increase may not be

made retroactive. Certain limited exceptions have been identified that would warrant payment of back wages under the Back Pay Act (5 U.S.C. 5596 (1988)). These exceptions involve clerical or administrative errors that (1) prevented an approved personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy. Both of the retroactive salary increases granted to title 5 employees that we examined were found to be permissible payments of back pay under these general exceptions.

The remaining 20 retroactive salary increases affected employees appointed under title 3.[4] No previous GAO decisions or court cases have been issued concerning salary adjustments for title 3 employees. White House Legal Counsel officials and the Justice Department's Office of Legal Counsel argue that the President's employment authority under title 3 is very broad, and that the specific cases we reviewed were within the scope of that authority. Although these actions may not have been considered proper under title 5, their legality must be judged under the broad authority of title 3 which, as noted above, authorizes the President to appoint and fix the pay of certain employees in the White House without regard to any other provision of law

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[4]The remaining 8 retroactive salary adjustments were salary decreases. Our examination of the individual cases revealed no basis to question those actions.

regulating the employment or compensation of persons in the Government service. We concluded, based on the broad language of the statute and its legislative history, that such retroactive pay increases were legal.

However, we continue to be concerned that the White House and Justice counsels' argument that the President has "absolute authority" within the broad authority of title 3, and need not justify his actions provided that the employees worked and the total numbers of appointments and the pay caps of title 3 are not violated, may not be consistent with congressional wishes and could lead to the statutory authority conceivably being used in unreasonable and abusive ways. For those reasons, despite the findings in the immediate cases that the actions taken were within the President's authority and hence legally proper, we believe that the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority with respect to retroactive pay adjustments.

TIMELINESS OF FINANCIAL DISCLOSURE

For the 147 employees identified by EOP who had a public financial disclosure report filing requirement under the conflict of interest laws[5], we found that 133 of the employees filed their financial disclosure forms within the required time frame. Of the 14 who did not, 11 were granted a waiver from the requirement and 2 paid the late filing penalty. The Office of Government Ethics is currently considering a waiver request for the remaining individual.

DUAL PAYMENTS AND OTHER PERSONNEL MATTERS

We also determined whether certain White House employees whose appointments were effective on or after January 20, 1993, the first day of the new Administration, had also received a salary payment from the Presidential transition accounts for the period between January 20 (a Wednesday) and February 20, which was the end of the final transition payroll period. We confirmed that 25 employees appeared to have overlapping salary periods and provided that information and estimates of the dual payment amounts to General Services Administration (GSA) and White House officials for their action.

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[5]Title I of the Ethics in Government Act of 1978, as amended.

At the time we completed our review, 10 of these employees had refunded amounts to the GSA, which administered the transition payroll. Since then, the White House has determined that the other 15 employees were also overpaid. On September 27, 1993, the fund manager for the Clinton/Gore transition staff asked GSA to take the necessary action to collect the overpayments from these 15 employees and the remaining amounts due from 9 of the 10 employees who had made previous repayments. GSA is currently in the process of determining the exact amounts to bill each of the 24 employees.

Finally, in the course of our work, we noted several other personnel related matters affecting 11 employees that we believed warranted further clarification or action. These matters included improper advancement of annual leave, retention of an employee on the payroll after the expiration of the temporary appointment, and several cases of salary overpayments resulting from confusion about effective dates of appointments. EOP officials either took or are in the process of taking corrective actions in those cases.

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Mr. Chairman, the details of our findings can be found in our report. This concludes my statement, and I would be happy to respond to any questions that you or your colleagues may have.

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Report to Congressional Requesters

September 1993

PERSONNEL PRACTICES

Retroactive Appointments and Pay Adjustments in the Executive Office of the President

GAO/GGD-93-148

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-254766

September 9, 1993

The Honorable Jim Lightfoot
Ranking Minority Member
Subcommittee on Treasury, Postal Service
and General Government
Committee on Appropriations
House of Representatives

The Honorable Frank Wolf
House of Representatives

The Honorable Ernest J. Istook, Jr.
House of Representatives

On April 22, 1993, you asked us to review various matters relating to new personnel at the Executive Office of the President (EOP).[1] You were particularly interested in our assessment, since January 20, 1993, of (1) the propriety of retroactive personnel appointments and salary adjustments and (2) compliance with public financial disclosure reporting requirements.

You asked us to provide information on these matters for the Subcommittee's consideration of a supplemental appropriations bill, subsequently enacted as P.L. 103-50, July 2, 1993. We provided preliminary information to your offices in May and June 1993 as we obtained this information from White House Office and Office of Administration (OA) officials. In July 1993, you also asked us to examine whether any new employees had received compensation from both EOP and the presidential transition team for the same period. This report provides our assessment of the information obtained in response to your request.

[1]EOP agencies included in this review were the White House Office, the Office of the Vice President, OA, the Office of Management and Budget (OMB), the Council of Economic Advisers, the Council on Environmental Quality, the Office of Policy Development, the National Security Council, the Office of the U.S. Trade Representative, the Office of Science and Technology Policy, and the Office of National Drug Control Policy.

Results in Brief

From January 20, 1993, through April 24, 1993, EOP made 611 new personnel appointments.[2] Of these appointments, 230 (38 percent) were retroactive and, of those, 136 (59 percent) were retroactive to the first pay period of the new administration. Of the 230 retroactive appointments, 185 (80 percent) were one pay period late. The signed appointing documents for the retroactive appointments were processed by the OA personnel office from one to nine pay periods[3] after the effective dates of the appointments. Retroactive salary payments totaled about $335,800 and ranged from $88 to $11,500. On the basis of our review of documentation provided by White House Office and OA officials and supervisors' certifications that selected individuals had actually worked during the retroactive periods, we concluded that the individuals appointed retroactively were entitled to receive pay for their work.

During the same period, 56 employees received salary increases, and 11 received salary decreases after their initial appointment dates. Of the increases, 22 were made retroactive, and the payments to employees for retroactive salary increases totaled $16,116. Of the 11 decreases, 8 were made retroactive, and the employees repaid $6,724 to the federal government for salaries previously paid.

We agreed with White House Office and OA officials that of the 22 retroactive increases granted, the 2 granted to title 5[4] employees were proper because they corrected administrative errors that prevented the initial salaries from being set in accordance with nondiscretionary administrative policies. Similarly, we found that 12 of the 20 retroactive increases granted to title 3 employees were proper. We accepted appointing officials' certifications[5] in the absence of contemporaneous documentation that they made employment offers at specified salaries or

[2]Initiation of a personnel action usually starts with the execution of an appointment document (i.e., a Standard Form 52; a WHP-1, an alternative form used by the White House; or a memorandum) by an authorized appointing official. These documents identify, among other data, the effective date of the appointment and the employee's salary. According to White House officials, office and unit heads were authorized appointing officials, although almost all new appointments required final approval by the Assistant to the President for Management and Administration before appointment documents were processed by the OA's personnel office.

[3]One individual was appointed nine pay periods late. Otherwise, four pay periods late was the longest time frame.

[4]Title 5 is the statutory authority used for the appointment and pay setting for most federal employees. Title 3 is the statutory authority used by the President and Vice President to appoint and set the pay of employees in the White House Office, the Office of the Vice President, the Office of Policy Development, and a limited number in OA without regard to other laws regulating the employment and compensation of federal employees but subject to limitations regarding maximum rates of pay.

[5]A certification for one employee was pending at the time we completed our report.

forwarded written requests for salary increases as evidence that the salary decisions were not implemented as originally intended or were delayed awaiting action by other EOP, White House Office, or OA officials. For similar reasons, we believe the eight retroactive decreases were proper.

We also had questions regarding the retroactive salary increases for the remaining eight title 3 employees. In these cases, the pay adjustments were made retroactive to a date before the approving official made the decision, although the work in question had already been performed at an approved salary rate. Rationales were provided to us for these cases, and the White House provided us copies of Justice Department legal opinions concluding that such retroactive adjustments are proper within the President's authority under title 3, which is very broad.

However, because retroactive salary adjustments are usually prohibited unless specifically authorized in statute, these eight retroactive payments focused our attention on the larger issue of the breadth of the President's authority under title 3. According to the White House and the Justice Department, the President has absolute authority over the compensation of title 3 employees and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap. Under this interpretation, the title 3 authority could concelvably be used in unreasonable or abusive ways. We have reservations about whether the broad interpretation of the statute clearly reflects congressional intent.

We identified several irregular personnel and pay actions in the course of our work. First, 25 new EOP appointees received compensation from both EOP and General Services Administration's (GSA) presidential transition appropriations for the same period. The White House and OA officials are in the process of determining if these employees have been unduly compensated. Within EOP, we also found one case of an improper advance of annual leave, one case in which an individual was retained on the payroll beyond the expiration of his temporary appointment, and nine cases in which employees were improperly overpaid. OA has taken, or is in the process of taking, action to resolve these matters.

Finally, of the 147 new EOP employees White House Office officials identified as being required to file public financial disclosure reports, all had filed reports, but 14 of these reports were not filed within the time requirements contained in Office of Government Ethics (OGE) regulations.

Background

EOP employees are appointed under title 3 and title 5 of the U.S. Code. Title 3 provides the President and Vice President with the authority to appoint and fix the pay of certain EOP employees without regard to any provision of law regulating the employment or compensation of federal government employees but subject to limitations regarding maximum rates of pay. This authority was used exclusively in the White House Office, the Office of the Vice President, and the Office of Policy Development, which constituted the majority of new EOP appointments. Title 5, which contains specific requirements relating to the pay and position classification of most executive branch employees, was the authority used to appoint most of the remaining EOP employees to career and excepted service positions.

Most of the EOP appointments were approved by the Assistant to the President for Management and Administration who, between January 20, 1993, and February 28, 1993, was also designated by the President as Acting Director, OA. OA is responsible for processing the appointment documents prepared by EOP authorizing officials and maintaining the personnel records of all EOP employees. By virtue of his position and given the practices of past administrations, the Assistant to the President for Management and Administration was considered to be the authorized appointing official, as was his assistant through a verbal delegation of authority, according to White House Office and OA officials. These officials subsequently told us that individual office and unit heads and some of their staff also had verbal delegations of authority to authorize appointments as long as they stayed within their budgets and obtained the signed approval of the Assistant to the President or his assistant.

Under the Presidential Transition Act of 1963, as amended, P.L. 88-277, GSA receives funding to provide administrative support requested by the Office of the President-elect and the Vice President-elect during the transition period (from the day after Election Day until 30 days after Inauguration Day). Funds may be used to compensate members of office staffs,[6] obtain and equip suitable office space, procure services from experts and consultants, and pay such other expenses as allowances for travel and amounts for communication services. GSA is responsible for processing personnel actions for staff designated by the President-elect or Vice President-elect, maintaining payroll records for these individuals, and providing those accounting services requested by the Office of the President-elect.

[6]Persons receiving compensation as members of the transition team are not considered to be federal employees, except for those employees who are detailed from federal agencies.

The Ethics in Government Act of 1978, as amended, requires that certain employees with 1993 annual rates of pay at or above $79,930 and certain other classes of employees must file public financial disclosure reports. They are to be filed within 30 days of the effective date of the appointment, unless extensions are granted. Agencies' reviewing officials may grant up to a 45-day extension, and OGE may grant an additional extension, which may not exceed 45 days. Individuals who do not file within 30 days after the date the report is required to be filed or on the last day of an extension are to be fined $200, unless the fine is waived.

Approach

We examined EOP personnel and payroll records to identify all new appointments made in EOP between the start of the administration on January 20, 1993, and the end of the ninth 2-week pay period in the current EOP payroll year, which was April 24, 1993. We also reviewed official personnel folders for (1) all employees whose effective dates of appointment were two or more pay periods earlier than the dates the personnel actions were processed; (2) a sample of employees whose effective dates of appointment were one pay period earlier; and (3) employees whose payroll records showed evidence of a change in salary or payment of an amount greater than would normally have been due as a biweekly salary payment. Finally, we reviewed and compared presidential transition payroll records with EOP payroll data to determine whether individuals received dual compensation.

We also reviewed documents provided by White House Office and OA officials to identify whether (1) employees appointed retroactively were actually working during the period for which they were paid and (2) employees required to file financial disclosure reports did so in a timely manner. The specific steps we followed and documents we reviewed are detailed in appendix I.

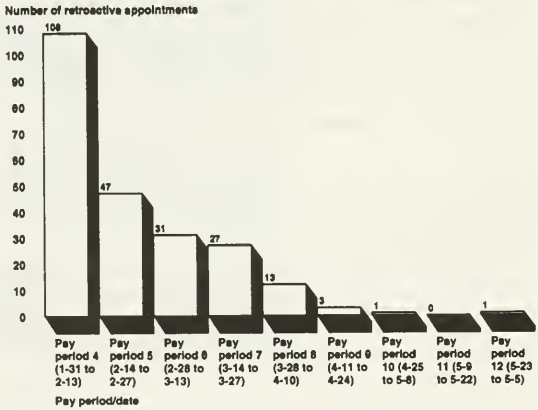
With the exception of presidential transition employment termination dates obtained from GSA, we relied primarily on White House Office and OA officials to provide us with documentation, excerpts thereof, or third-party certifications on new EOP appointees and changes in their pay.

EOP Officials Authorized Retroactive Personnel Actions

During the period between January 20, 1993, when President Clinton was inaugurated, and April 24, 1993, a total of 611 new appointments were made to positions in EOP. Of these 611 appointments, 230 (38 percent) were for an effective appointment date that was one or more biweekly pay periods earlier than the date the personnel action was processed by the personnel office. These 230 employees generally received lump sum payments included in their first regular pay checks for back pay covering the period between the effective dates of their appointments and the pay period their appointments were entered into the payroll system. Some others, primarily for reasons of timing, received a separate manually processed check for their back pay.

As shown in figure 1, 108, or almost 50 percent, of the retroactive appointments were processed during pay period 4, which was the first full pay period after the start of the new administration. Another 78 retroactive appointments, or 34 percent, were processed during pay periods 5 and 6.

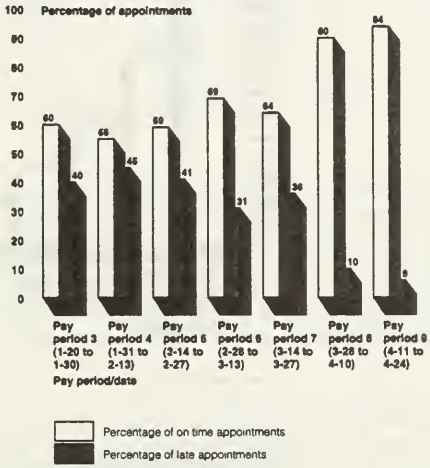
Figure 1: Pay Periods In Which Retroactive Appointments Were Processed



Source: GAO analysis of EOP data

Of the 341 appointments effective between January 20 and 30, 205 (about 60 percent) were processed on time. Of the 230 retroactive appointments, 185 (or 80 percent) were one pay period late. However, one retroactive appointment with a January 20 effective date was processed as late as June 5. The proportion of timely to untimely appointments by pay period is shown in figure 2.

Figure 2: Percentage of All Appointments That Were Retroactive by Pay Period



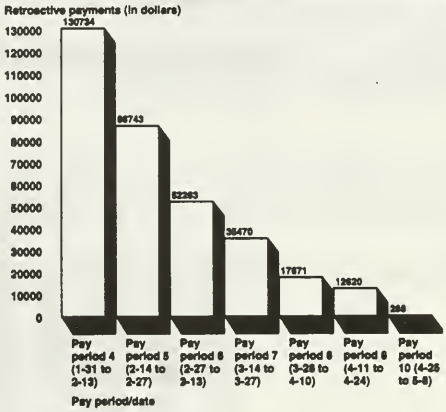
Note 1: Two retroactive appointments made in subsequent pay periods were not included in these percentages.

[a]Pay period 3 started January 17, 1993.

Source: GAO analysis of EOP data.

The 230 retroactive appointments resulted in back payments totaling $335,787. Figure 3 shows the amount of back pay issued in each of the pay periods we examined.

Figure 3: Amount of Retroactive Payments by Pay Period Appointed



Source: GAO analysis of EOP data.

Table 1 shows the pay periods in which retroactive appointments were made and how many pay periods late they were. Of the 230 retroactive appointments, 136 (59 percent) were retroactive to pay period 3, the first pay period of the new administration.

Table 1: Late Processing of New Appointments by Pay Period of Appointment

Date pay period ended	Pay period number	Pay periods late				
		One	Two	Three	Four	Nine
February 13	4	108	•	•	•	•
February 27	5	28	19	•	•	•
March 13	6	20	6	5	•	•
March 27	7	16	8	0	3	•
April 10	8	10	0	1	1	•
April 24	9	2	0	1	0	•
May 8	10	1	0	0	0	•
May 22	11	0	0	0	0	•
June 5	12	0	0	0	0	1
Total		**185**	**33**	**7**	**4**	**1**

Source: GAO analysis of EOP data.

We did not determine whether retroactive appointments have historically been made in EOP. However, it does appear that the new administration did not initially intend to make retroactive appointments. We obtained an undated memorandum from the Assistant to the President for Management and Administration to all department heads announcing a deadline of January 28, 1993, for the submission of information (i.e., name, title, salary, and starting date) for all employees who they wanted to pay for the period from January 20 to January 30, 1993. The memorandum advised, "Please note that there is no backdating in the Federal Government."

White House Office and OA officials told us that the instructions in the memorandum were not carried out because appointing officials were too busy to take care of these personnel matters. This memorandum was issued for the purpose of monitoring employment levels in anticipation of the February announcement of the planned 25-percent cut in staffing levels. They also said that the overload of existing processes and procedures contributed to the need for retroactive appointments.

We noted that although the number of retroactive appointments decreased over time, their percentage relative to timely appointments in each pay period did not significantly decrease until about 2 months after the inauguration. In the cases we reviewed, untimely appointments resulted primarily from (1) failure of the originating EOP office to forward appointing documents or memoranda to the Office of the Assistant to the

President for Management and Administration, (2) the need to obtain that office's final approval, and (3) the time needed by OA to process documents once this approval was obtained.

Employees Appointed Retroactively May Be Paid for Their Services

Our decisions related to employees appointed under title 5 have long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision, unless a later date is stated in the appointment. Appointments are not considered valid when made retroactively to cover services previously rendered.[7] However, where employees performed their duties in good faith without fraud for a period prior to the approval of their appointment, they are considered to be de facto employees and may be paid for their services.[8] This rationale would also apply to title 3 employees.

Payment of back pay in cases of retroactive appointments is justified when the employees actually worked or were in an authorized pay status such as annual or sick leave for the workdays covered by the appointments. For 8 of the 185 individuals appointed one pay period later than their effective dates and most of the employees appointed more than one pay period late,[9] White House Office staff provided, at our request, certifications signed by individuals identified as immediate supervisors, or other employees in a position to know, that these employees worked during the periods of their retroactive appointments.

Retroactive Pay Adjustments for EOP Employees

We also identified 56 new appointees who received salary increases and 11 who received salary decreases with effective dates from January 20 to April 24, 1993. Of the salary increases, 22 were retroactive. That is, the increases had an effective date at least one pay period earlier than the pay period in which the increase was processed. Eleven of these were made retroactive to the employees' appointment dates, which were from 1 to 11 pay periods earlier. The 22 salary increases ranged from $1,000 to $25,000 per annum. The retroactive pay totaled $16,116 and ranged from $58 to $3,720. For the eight retroactive decreases, employee repayments totaled $6,724 and ranged from $192 to $1,456.

[7] 20 Comp. Gen. 267 (1940) and 18 Comp. Gen. 907 (1939).

[8] Donald G. Stitts, B-216369, March 5, 1985, and B-191397, September 6, 1978.

[9] After we completed this step, we identified several other employees whose appointments were more than one pay period late.

Our review of EOP personnel files and payroll records raised questions about the validity of the retroactive pay increases and decreases. In explaining their decisions to make the pay adjustments retroactive, White House Office or OA officials told us that they were made retroactive due to (1) administrative delays in processing the required paperwork to effect the approved pay adjustments, (2) errors in the initial processing of approval documents, (3) administrative staff not receiving clear guidance on whether the adjustments were intended to be retroactive, or (4) lessening budgetary uncertainties in the early days of the new administration that enabled them to raise salaries to levels they would have initially preferred to pay. White House Office and OA officials also told us that the legal basis for such adjustments was their broad authority to set and adjust pay under 3 U.S.C. 105 and 107.

For each of the employees who received retroactive pay adjustments, we obtained and discussed additional facts with White House Office and OA officials.

Pay Increases for Two Title 5 Employees

Our decisions and numerous court cases have held that an employee of the federal government is entitled only to the salary of the position to which the employee has been appointed.[10] Thus, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. The exceptions to the general rule against retroactive salary increases that would warrant the payment of back wages under the Back Pay Act, 5 U.S.C. 5596 (1988), are where clerical or administrative errors occurred that (1) prevented an approved personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy. The effective date of a change in salary is the date the action is taken by the administrative officer vested with approval authority or a subsequent date specifically fixed by that officer.[11]

White House Office and OA officials told us that administrative errors were the cause of these two title 5 employees not being paid the proper salaries. These officials stated that according to long-standing policy, the

[10]United States v. Testan, 424 U.S. 392, 402, 406 (1976); United States v. McLean, 95 U.S. 750 (1878); Goutos v. United States, 212 Ct. Cl. 95 (1977); Peters v. United States, 208 Ct. Cl. 373 (1976); Bielec v. United States, 197 Ct. Cl. 550 (1972); Dianish v. United States, 183 Ct. Cl. 702 (1968); Lee v. United States, 45 Ct. Cl. 57 (1910); and Jackson v. United States, 42 Ct. Cl. 39 (1906). See also Agnes Mansell, 64 Comp. Gen. 844 (1985); 54 Comp. Gen. 263 (1974); and 21 Comp. Gen. 95 (1941).

[11]Agnes Mansell, 64 Comp. Gen. 844, 845, supra, and 21 Comp. Gen. 95, supra.

employees should have been initially paid at the higher rates, which they eventually received. In one case, an employee was supposed to have been paid a salary equal to her past congressional salary, but the salary included on the appointing documents did not reflect a recent January pay increase because incorrect congressional pay information was transmitted. In the other case, a college senior was appointed as a grade GS-3 intern, the pay rate for college juniors, rather than as a grade GS-4 intern, the pay rate for seniors. When these administrative errors were discovered, retroactive pay adjustments were made.

On the basis of our discussions with, and documentation provided by, White House Office and OA officials, we agree that these two retroactive pay increases were consistent with our prior decisions. Since long-standing policies to appoint the two employees at the higher salary levels were not followed, the personnel actions could be retroactively corrected so as to conform to those policies.

Retroactive Pay Decreases for Eight Appointees

With respect to the eight retroactive pay decreases, White House Office and OA officials explained that there was no intention to appoint the employees at the higher salary rates and that data entry errors occurred during the preparation and/or processing of appointment documents. They also told us that these salary decreases were discussed with the eight employees before they took effect.

For four employees, a White House Office official told us that their appointing officials were no longer EOP employees. For two of the remaining four employees, we requested and received appointing officials' certifications stating that errors resulted in these employees being paid at higher salaries than originally intended. On the basis of these certifications and our discussions with White House Office and OA officials, we agreed that the retroactive decreases would be allowed even under title 5 standards.

Retroactive Increases for Title 3 Employees

The other 20 retroactive increases were granted to employees appointed under 3 U.S.C. 105(a)(1), which provides as follows:

"[T]he President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

Similar language is contained in 3 U.S.C. 107(a)(1) and (b)(1) relating to the Domestic Policy Staff and OA.

Little or no reason for the employees' pay adjustments appeared in their respective personnel files. Some of the retroactive adjustments were for a few days, and one involved a payment covering 11 biweekly pay periods.

In 12 of the 20 retroactive increases, we found that errors occurred in the implementation of appointing officials' decisions. Nine of the 12 cases involved salary rates agreed to between the prospective employees and the appointing officials that were incorrectly noted on the appointing documents. The other three cases involved the lack of follow-through on decisions authorizing the salary increases. The decisions were originally communicated verbally or in writing by office or unit heads for processing on or before the effective dates of the increases but were not implemented in a timely manner.

For a number of the cases, White House Office or OA officials asserted that the pay adjustments were done retroactively because (1) original appointing documents erroneously contained lower salaries than originally agreed to between the appointing officials and prospective employees or (2) appointing officials' decisions were not implemented by administrative staff responsible for preparing the necessary appointment documents. These situations apparently occurred because for title 3 appointments, unlike under title 5, appointing officials acted under verbal delegations of authority and generally did not always prepare, sign, date, or review original appointment documents or subsequent changes containing the specific data on salaries and effective dates.

These types of situations would seldom occur under title 5 appointment procedures, which generally require that appointing officials sign and date the appointment documents. Although we believe that sound personnel management practices would generally dictate that appointing officials document their decisions by reviewing and signing official requests for personnel actions, we have no basis to conclude that such documentation is required for title 3 appointments. Nevertheless, in deciding this legal issue for the first time, we wanted to obtain the most relevant factual evidence available to us. Accordingly, we requested and White House Office officials obtained for us signed certifications by appointing officials that the retroactive pay changes were made for the reasons described above. On the basis of this additional documentation, we found that these pay adjustments were consistent with our prior decisions.

The salary increases for the remaining eight title 3 employees were made retroactive to a date before the approving official decided the level of the salary increase, although the work in question had already been performed at an approved lower salary rate. In seven cases, White House Office and OA officials said these actions were taken to follow through on a previous commitment to raise the pay of these employees after they had worked a specified period of time. The seven increases ranged from $58 to $1,844 for the retroactive periods. In the remaining case, White House Office and OA officials said that administrative staff processed the increase retroactively because the staff did not receive clear guidance on the intentions of the office head. This increase totaled $134 for the retroactive period.

Issues Concerning the Scope of the Title 3 Authority

Because retroactive salary adjustments are generally prohibited without specific authorization in statute, the eight retroactive pay adjustments described above raise a question about the scope of the President's title 3 authority. White House Office officials view the President's authority under title 3 as very broad. They provided us with two memoranda prepared by the Department of Justice's Office of Legal Counsel (OLC), dated July 30, 1993, and September 1, 1993, which stated that retroactive salary increases are authorized under title 3, so long as they do not exceed the statutory salary limitations and are in the form of compensation for work performed (see app. II). The OLC memoranda cite the sweeping language of the statute as well as the legislative history which refers to the President's "total discretion" in appointing personnel and setting rates of compensation. The opinions also argue that such retroactive payments are analogous to performance bonuses and incentive awards, which are commonly found in both the public and private sectors.

While the types of retroactive pay increases provided in the eight cases above might not be questioned in the private sector, in the federal government these kinds of actions have generally been prohibited except when specifically authorized in statutes. Thus, these retroactive increases would not be consistent with generally applicable federal personnel rules. However, we do not question their legality in view of the President's broad authority under title 3 to fix the pay of White House employees "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

We do, however, have reservations as to whether the broad interpretation of the statute clearly reflects congressional intent concerning the scope of the President's authority. According to the White House and the Justice

Department, the President has absolute authority over the compensation of title 3 employees and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap. Under this broad interpretation, the title 3 authority could conceivably be used in unreasonable or abusive ways. We believe some clarification of the intended scope of title 3 may be desirable.

Overlapping Compensation Received by Some EOP Appointees

Of the 611 individuals appointed to EOP positions during the period of our review, 25 received compensation from GSA for their work as nonfederal employees on the presidential transition team and from EOP for the same time period. Of these 25 individuals, 10 had made repayments to GSA. However, 9 of the 10 repayments did not cover the complete periods that overlapped. For the most part, the days involved were from January 20, 1993, to February 6, 1993.

According to GSA officials, EOP staff notified GSA of the possibility of overpayments in mid-March. Between the end of April and the end of June 1993, 10 individuals had returned net pay totaling $7,100. For the remaining 15 individuals and for the 9 individuals whose repayments did not cover the complete overlapping period, we estimated the gross pay that these individuals may owe is $9,676.

White House Office and OA officials told us that they were in the process of determining whether the 24 employees had been unduly compensated. In which case, the White House would assist GSA in collecting any amounts these employees erroneously received.

Irregular Personnel Actions Occurred

During the course of this review, we identified personnel-related matters affecting 11 employees that we brought to the attention of White House Office and OA officials for their resolution. These matters involved one employee who was improperly advanced annual leave, one employee who was improperly retained on the payroll after the appointment expired, and nine employees who were overpaid. The White House Office or OA either took or are in the process of taking appropriate corrective actions.

Improper Authorization of Advanced Annual Leave

An OMB employee subject to the Annual and Sick Leave Act was given a 30-day temporary appointment beginning April 5, 1993. However, on April 14, 1993, the employee was advanced 40 hours of annual leave even though the employee would not have accrued sufficient annual leave to

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cover the advance during the temporary appointment. According to a memorandum for the record, this advance of annual leave was made in the expectation that the employee would soon receive a permanent appointment and would accrue sufficient annual leave by the end of the leave year to cover this absence. The employee subsequently received the permanent appointment.

Federal employees with less than 3 years of service accrue 4 hours of annual leave each biweekly pay period. At the discretion of the employing agency, employees may be advanced an amount of annual leave that is equal to or less than the amount of leave the employee would be able to accrue during the term of the appointment or through the end of the leave year, whichever is less. The 1993 EOP leave year ends on January 1, 1994.

The advance of annual leave to the employee in this situation was improper because annual leave may only be advanced up to that amount that the employee would have accrued during the appointment period.[12] Although the advance of leave was improper at the time the employee had a temporary appointment, we think OA took appropriate corrective action by establishing a negative leave balance that the employee would be able to reduce through subsequent leave accruals once appointed to the new permanent position.

Employee With Expired Appointment Retained on the Payroll

The temporary appointment of a title 5 National Security Council employee expired, yet the employee continued to receive pay for about a month. Subsequently, the employee received a permanent appointment. EOP and OA officials maintained that the employee worked during this period under an authorized appointment because the appointment document (Standard Form 52) was signed by the office head, an authorized appointing official. Although this document was signed, we do not believe a valid appointment existed because a final decision by the Assistant to the President had not been made as to whether to make the appointment temporary or permanent. We requested and received a supervisory certification that the employee did, in fact, work. Accordingly, we considered the employee a de facto employee who may be compensated for services extending beyond the appointment limitation.[13]

[12] Monideep K. De, 67 Comp. Gen. 594 (1989).

[13] Donald G. Stitts, B-216369, Mar. 5, 1985, and B-191397, Sept. 6, 1978.

Nine Employees Were Overpaid

The overpayments for eight of the nine employees occurred because their effective appointment dates, used to determine the number of work days for which they were paid, were subsequently changed to a more recent date to reflect the dates they actually began working and to avoid overlap with presidential transition team employment. As a result, they received pay for periods for which they did not work for EOP agencies. White House Office and OA officials recognized that these eight payments were made erroneously and assured us that collection actions have been started.

The appointment of one of the nine employees was initially processed with an effective date of January 20, 1993. According to White House Office officials, a cancellation of that effective date was apparently done incorrectly because although the employee's correct effective date was February 5, which was near the middle of the pay period, he was paid from February 1, the first Monday of the pay period. Payment for the 4 days prior to entrance on duty was improper because the employee performed no services and held no appointment to justify the compensation. White House Office officials recognized that this payment was made erroneously and assured us that collection action has been started.

Most EOP Employees Filed Their Public Financial Disclosure Reports When Required

For the 147 employees identified by EOP who had a public financial disclosure report filing requirement, we reviewed the cover sheet (which contained, among other things, their name, signature, and the date signed)[14] to determine whether their reports were filed within 60 days of the effective date of their appointment or within 30 days of an approved extension period. We found that 133 employees filed their financial disclosure reports within acceptable time frames.

Of the 14 employees who did not meet their filing requirements in a timely manner, the White House Office requested, and OGE approved, waivers of penalties for 6 employees who were not aware of their filing requirements. The White House Office is requesting waivers for five additional employees. Two employees have paid the $200 late filing penalty, and the status of the remaining employee was pending at the time we finalized this report.

Conclusions

Retroactive appointments were a frequent occurrence during the early months of the new administration, but information was not available to

[14]We did not review the disclosure reports themselves because such a review was outside the scope of our work.

make comparisons with previous administrations. Although some volume of retroactive appointments may be unavoidable during any change in administrations, several irregular personnel actions also occurred, and actions to correct the problems we identified are under way.

Although the language of the President's authority under 3 U.S.C. 105 and 107 is very broad, certain retroactive pay increases have focused our attention on the issue of the extent to which the President has authority to make retroactive pay adjustments. The White House and Justice Department believe that the President has absolute authority and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap.

On the basis of that authority, we concluded the retroactive pay increases were proper. However, we have reservations about whether the broad interpretation of the statute clearly reflects congressional intent concerning the scope of the President's authority. Under this interpretation, the title 3 authority could conceivably be used in unreasonable and abusive ways. Further clarification of the President's title 3 authority may be desirable.

Matter for Congressional Consideration

Because retroactive salary adjustments are usually not permitted without specific statutory authority and the breadth of the President's authority as described by the White House and the Justice Department leaves room for possible abuse, the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority.

White House Comments and Our Response

The Assistant to the President for Management and Administration provided written comments on a draft of this report (see app. III). In its comments, the White House agreed with the facts presented in the report, restated its reasons for making the retroactive appointments and pay adjustments, and expressed its belief that there is no need for legislative action regarding the President's authority under title 3. In the White House's view, the scrutiny given to presidential action as well as the statutory caps on salary levels curb the possibility for abuse. In addition, the White House expressed concern that limiting the President's authority in this area could inhibit future presidents in responding to changing needs and demands, especially during the start of new administrations.

We recognize that in enacting title 3 the Congress intended that the President have broader authority and flexibility to appoint and set the pay of his employees than is the case with other executive branch employees. However, we have reservations about the White House's position that the only limits on the President's authority relate to salary pay caps and the requirement that employees actually worked. Thus, we continue to believe that clarification of the intended scope of the President's authority may be desirable.

We are sending copies of this report to the Chairman, House Appropriations Subcommittee on Treasury, Postal Service and General Government; the Republican Leader of the House of Representatives; the Assistant to the President for Management and Administration; the Director of OA; the Director, Office of Personnel Management; and other interested parties. We will also make copies available to others on request.

The major contributors to this report are listed in appendix IV. If you have any questions on this report, please call Nancy Kingsbury, Director, Federal Human Resource Management Issues, on (202) 512-5074.

Johnny C. Finch

Johnny C. Finch
Assistant Comptroller General

Appendix I

Objectives, Scope, and Methodology

Our objectives were to determine for new EOP appointees (1) the length of time any appointments were delayed and the amount of retroactive payments these appointees received; (2) whether appointees had their pay increased or decreased retroactively after their initial appointments and, if so, the appropriateness of such actions; (3) whether new appointees received overlapping compensation; and (4) the timeliness with which employees filed their financial disclosure reports.

We identified all EOP appointments made from January 20, 1993, to April 24, 1993, to determine the timeliness of personnel actions involving new EOP appointments. We examined personnel and payroll reports produced by the Defense Business Management System (DBMS)[15] —formerly the Automated Payroll Cost and Personnel System (APCAPS). OA staff had annotated some of these records to indicate the number of pay periods individuals' appointments were delayed. To help ensure that we identified all new EOP appointments between the above dates, we also reconciled that information with a DBMS report with enter-on-duty (EOD) dates before January 20, 1993, and DBMS reports that were prepared after April 24, 1993. During an explanation and demonstration of certain DBMS operations by OA staff, we obtained these reports as a means of confirming data previously provided.

We examined the official personnel files of all individuals with retroactive appointments that were made two or more biweekly pay periods after their EOD dates. For appointees whose appointments were made either on time or one pay period late, we used interval sampling[16] to select the files for review. For the cases reviewed, we used data from the personnel files to confirm appointees' EOD dates and the dates these personnel transactions were entered into DBMS. We also identified the EOP officials who had approved these individuals' appointments and, where available, the dates of these approvals. We considered the appointments to be retroactive if the appointing documents were signed and dated after the appointees' EOD dates and were entered into DBMS in pay periods after these dates.

Using the database showing new appointees through April 24, 1993, we obtained supervisors' certifications for 30 of the 33 individuals with

[15]All EOP personnel and payroll transactions are processed through DBMS. DBMS is operated by Defense Finance and Accounting Service personnel at the Defense Electronic Supply Center in Dayton. OA staff have access to DBMS data through computer terminals located in their offices in Washington, D.C.

[16]From a DBMS report of new EOP appointments, we selected for review every tenth case for the on-time appointments and every seventh case for those that were one pay period late.

retroactive appointments who were appointed two or more pay periods after their EOD dates and for several other individuals with retroactive appointments whose appointments were delayed by one pay period. In some cases, these certifications were signed by employees' immediate supervisors; in other cases, they were signed by higher level supervisors. We also analyzed a June 5, 1993, database to determine whether additional retroactive appointments or changes to EOD dates were made during the period of our review. For any such additions or changes, we determined whether their pay was calculated accurately but did not obtain supervisory certifications.

To determine the total amount of retroactive payments made to individuals, we analyzed automated payroll history information from DBMS and calculated the amount of back pay that was included in biweekly pay checks. We also identified and analyzed retroactive payments that were manually processed through DBMS rather than during the processing of biweekly payrolls.

To identify how many appointees had their pay adjusted after they were appointed and the amounts of these adjustments, we used DBMS payroll history records to identify which appointees had their salaries increased or decreased. For employees who received retroactive salary increases, that is, their salary increases were effective in a pay period preceding the one in which the increases were processed, we calculated the portion of their pay that was retroactive.

In determining the appropriateness of the retroactive salary increases and decreases made to EOP appointees, we reviewed the laws and legislative histories relating to EOP appointments and reviewed prior court and Comptroller General decisions concerning retroactive personnel actions. We also obtained explanations for these retroactive pay adjustments from White House Office and OA officials and clarifications of the timing of selected appointees' personnel and pay transactions from OA staff.

To determine which individuals received compensation for working the same days for both the President-elect's transition team and EOP, we compared a transition team report that contained the termination dates of the employees' transition team activities with EOP records that contained EOD dates of new EOP appointees.

To determine if EOP appointees filed their Public Financial Disclosure Reports (Standard Form 278) on time, we compared the dates these

employees filed their forms with their EOD dates and any extension periods granted. For employees who did not meet the reporting requirement discussed in 5 C.F.R. 2634.201(b) and 2634.704(i), we determined if they asked for and received an extension for filing their reports. We did not review the contents of these reports.

Because of the anticipated time frames involved with comparing EOP payroll data with disbursement data from the U.S. Department of the Treasury, we did not verify the amounts paid to new EOP appointees or seek to identify whether any additional salary payments by the Treasury were not included in the documents provided to us.

We did our work from May 1993 to August 1993 in accordance with generally accepted government auditing standards.

Appendix II

Department of Justice Office of Legal Counsel Memoranda

U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

July 30, 1993

MEMORANDUM FOR BERNARD NUSSBAUM
Counsel to the President

Re: Presidential Authority under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office

This memorandum responds to your request for our opinion on whether 3 U.S.C. § 105(a) authorizes the President to grant retroactive pay increases to staff members of the White House Office. We conclude that retroactive pay increases are authorized as long as they do not exceed the statutory salary caps set forth in section 105(a)(2) and are in the form of compensation for employees' work as members of the White House Office staff.

I.

Section 105(a) provides that:

> (1) Subject to the provisons [sic] of paragraph (2) of this subsection, the President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Employees so appointed shall perform such official duties as the President may prescribe.
>
> (2) The President may, under paragraph (1) of this subsection, appoint and fix the pay of not more than--
>
> (A) 25 employees at rates not to exceed . . . level II of the Executive Schedule of section 5313 of title 5; and in addition
>
> (B) 25 employees at rates not to exceed . . . level III of the Executive Schedule of section 5314 of title 5; and in addition

> (C) 50 employees at rates not to exceed the maximum rate of basic pay then currently paid for GS-18 of the General Schedule of section 5332 of title 5; and in addition
>
> (D) such number of other employees as he may determine to be appropriate at rates not to exceed the minimum rate of basic pay then currently paid for GS-16 of the General Schedule of section 5332 of title 5.

(Emphasis added).

The text of section 105(a) expressly exempts the President from other laws regulating the pay of government employees. It provides that the President may set staff members' pay "without regard to any other provision of law" as to the employment or compensation of government employees, as long as the President observes the upper limits on the number of White House staff members at certain salary levels. We believe that, in view of this sweeping language, section 105(a)(1) allows the President complete discretion to adjust the pay for White House Office employees' work in any manner that he chooses, as long as he complies with the salary limits of section 105(a)(2).

The legislative history of section 105 supports this interpretation. Although the legislative history is sparse, it reveals Congress's intent to grant the President complete discretion, within the overall salary caps of sections 105(a)(2), regarding the compensation of White House Office staff members. The Senate committee report on the current version of section 105[1] explained that the bill would have the following effect:

> Subsection (a)(1) of section 105 authorizes the President to appoint and fix the pay of employees in the White House Office without regard to any other provisions of law regulating the employment or compensation of persons in the Government service. The language . . . expresses the committee's intent to permit the President total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees in the White House Office.

[1] In 1948, Congress passed an earlier version of section 105 when it enacted title 3 of the U.S. Code. Act of June 25, 1948, ch. 644, 62 Stat. 678. The current version of section 105 was enacted in 1978 as section 1(a) of Pub. L. No. 95-570, 92 Stat. 2445. We have examined the legislative history of both statutes.

S. Rep. No. 868, 95th Cong., 2d Sess. 7 (1978) (emphasis added). See also 124 Cong. Rec. 10112 (1978) ("Given the awesome responsibilities of the [O]ffice, a President has to have considerable leeway in selecting and compensating responsible staff personnel.") (remarks of Rep. Derwinski). Moreover, there is nothing in the legislative history to suggest that the President's discretion in adjusting the pay of members of the White House Office is limited in any manner other than as set forth in section 105(a)(2).

Thus, both the text and legislative history of section 105(a) support the conclusion that the President has complete discretion to adjust the pay of the White House Office staff as he sees fit, provided that he complies with the salary caps set forth in section 105(a)(2).

II.

We now turn specifically to retroactive pay increases. Section 105(a) contains one restriction on such increases, in addition to salary caps. We believe that, within the meaning of section 105(a)(1), the term "the pay of employees in the White House Office" is limited to compensation for employees' work as staff members of the White House Office. This limitation is implied by the statutory reference to fixing the "pay of employees," as well as by the dispensation from other laws governing "employment or compensation of persons in the Government service." In each instance, the statute focuses on the employment relation and suggests that payments must be based on government service.

However, as long as the payment is intended as compensation for an employee's work as a White House Office staff member (and the President complies with the salary limits in section 105(a)(2)), we believe the President is authorized to grant a retroactive pay increase. Under section 105(a)(1), the President has "total discretion" to choose methods of compensation. The President may determine the pay suitable for the level of responsibility actually undertaken by an employee and the quality of performance actually achieved. Such action is well within the President's discretion, especially because this form of compensation, as well as analogous types of compensation in the form of performance bonuses and incentive awards, increasingly may be found in both the public and private sectors. See, e.g., 5 U.S.C. §§ 5344 (authorizing retroactive pay increases for Executive Branch employees pursuant to a wage survey); 4502 (incentive awards); 4503 (agency incentive awards); 4504 (Presidential incentive awards); 4505 (incentive awards to former employees); 4507 (incentive awards to SES employees); 4512-4513 (agency and Presidential awards for cost savings disclosures); 5384 (performance awards to SES employees); 5406 (performance awards for non-SES employees); 5407 (cash award program); Steven

H. Appelbaum and Barbara T. Shapiro, Pay for Performance: Implementation of Individual and Group Plans, MANAGEMENT DECISION, Nov. 1992 at 86 ("paying someone extra for performance beyond the normal expectations . . . ha[s] become so pervasive . . . that few question [its] validity or efficacy"); John Grossmann, Pay, Performance and Productivity, SMALL BUSINESS REPORTS, Oct. 1992 at 50 ("Many U.S. business owners are finding that . . . [performance awards are] a good way to spur sales, boost productivity, and improve employee morale.").

As we have been informed by your Office, the General Accounting Office (GAO) takes the position that all payments having the effect of a retroactive pay increase are "in the nature of a gratuity" and are impermissible unless expressly authorized by statute. See 2 Comp. Gen. 515, 516 (1923) ("the Comptroller General opinion"). We disagree with the GAO's position.

Even assuming that some forms of "unearned" gratuities (e.g., gifts) are impermissible under section 105(a)(1), we believe that retroactive pay increases are permissible if they reflect a determination about the value of the work performed. To be sure, the employee may not have a legally enforceable right to receive such payments, but they still are "compensation" for work actually performed. See Appelbaum and Shapiro, supra at 86. In addition, such a payment is not a mere gratuity (or gift) with respect to the employee who receives the payment because the payment is often designed, at least in part, to encourage that employee to stay in government employment and to continue to render extraordinary service in the future. It may also be designed to correct an error in classifying the job that the employee has performed. Furthermore, a system of compensation that includes retroactive pay increases and other lump sum payments (such as bonuses and awards) is not designed exclusively, or perhaps even primarily, for the benefit of the employee who receives the award. A system of compensation such as this is designed for the benefit of the government, at least in part, because it fosters better office morale and encourages other employees to perform superior work. See Grossmann, supra at 50. Retroactive pay increases in the employment context are distinguishable, for example, from a mere gratuity paid in a one-time service transaction because the latter situation does not present any of these additional reasons for making the payment.

Nor do we believe that retroactive pay increases for the White House staff, even if they may be characterized as mere gratuities, must be expressly authorized by statute. As we have explained above, section 105(a) grants the President complete discretion to design a system of compensation for employees in the White House Office. Congress thus did not need to list every type of compensation that its general language would permit. Such a list would have been purely redundant at best, and at

worst might have led to an expressio unius est exclusio alterius argument, which would have conflicted with Congress's stated intent to allow the President "total discretion" in the compensation of employees in the White House Office.[2] As long as a payment is actual compensation, the statute permits it.

We therefore conclude that the President may grant retroactive pay increases to members of his White House Office staff as long as the payments are for the employees' work as members of the staff and the President complies with the limits set forth in section 105(a)(2).

Daniel L. Koffsky
Acting Assistant Attorney General
Office of Legal Counsel

[2] We believe that the facts of the Comptroller General opinion are distinguishable and that its reasoning is unpersuasive. The Comptroller General opinion addresses the question whether certain postal inspectors who resigned at a certain grade and were reinstated in the lowest grade could be promoted several grades at once (to one grade lower than the grade they were serving at the time they left the service). 2 Comp. Gen. at 516. The Comptroller General was construing a postal statute that authorized successive promotion only, and he concluded that the postal inspectors could not be promoted to one grade lower than their former grade, either retroactively to their reinstatement or at any time. Id. The postal statute at issue and the facts of that case are thus unrelated to the President's discretion under 3 U.S.C. § 105(a) to promote his White House Office staff and fix their compensation as he sees fit. Moreover, the Comptroller General opinion states its conclusion -- that reinstatement "at a higher grade would be in the nature of a gratuity which is not authorized under existing law," id. -- without any legal reasoning whatsoever. Such a cryptic decision is of limited persuasive value.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

September 1, 1993

MEMORANDUM FOR BERNARD NUSSBAUM
Counsel to the President

Re: Presidential Authority Under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office

In an earlier opinion, we concluded that the President may grant retroactive pay increases to staff members of the White House Office, as long as the increases are within statutory salary caps and are in the form of compensation for employees' work as members of the White House Staff. See Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, "Presidential Authority Under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office" (July 30, 1993) (OLC Memorandum). You have asked whether a draft report of the General Accounting Office, "Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President" (Draft Report), leads us to alter this conclusion. We stand by our previous view.

The Draft Report contends that

> while Title 3 may be viewed as allowing reasonable retroactive adjustments that are appropriately justified, they do not give the President unfettered discretion to pay an individual for services not performed or to retroactively increase or decrease an employee's pay without good reason.

Draft Report at 13 (original emphasis). We agree with part of this statement. We too concluded, on the basis of the language in 3 U.S.C. § 105(a), that any retroactive pay increase must be for services performed. OLC Memorandum at 3. However, the Draft Report also asserts that any retroactive pay increases must be "appropriately justified." Although the precise meaning of this assertion is unclear, the Draft Report appears to suggest that the President must give reasons for his decisions about retroactive pay increases. The Draft Report contrasts prospective action by the President, for which no documentation

is required, with retroactive adjustments. Draft Report at 13. In support of its position, the Draft Report does not cite any language in the statute or in the legislative history; indeed, it cites no authority at all.

As the statute and its legislative history show, Congress imposed no such requirement on the President when he decides whether an employee's work merits a retroactive pay increase. As long as the President observes statutory pay limits, he may fix the compensation of White House staff members "without regard to any other provision of law regulating the employment or compensation of persons in the Government service." 3 U.S.C. § 105(a)(1). The Senate committee report explained that this language "expresses the committee's intent to permit the President total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees in the White House Office." S. Rep. No. 868, 95th Cong., 2d Sess. 7 (1978) (emphasis added). The Draft Report, in apparently asserting that the President must present a justification for retroactive pay decisions, has made up a requirement that Congress did not impose. The Draft Report as much as concedes this point: it recommends that Congress "consider amending Title 3 to clearly set forth the President's specific authority regarding retroactive pay adjustments." Draft Report at 17. Whether such a change would be wise or not, the law at present gives the President complete discretion to decide when an employee deserves a retroactive pay increase.

We therefore adhere to our earlier opinion.

Daniel L. Koffsky
Acting Deputy Assistant Attorney General
Office of Legal Counsel

Appendix III

Comments From the White House

THE WHITE HOUSE

WASHINGTON

September 7, 1993

Ms. Nancy Kingsbury
Director
Federal Human Resource Management Issues
United States General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Kingsbury:

Thank you and your staff for your cooperation throughout the course of this audit. Although your report makes clear that there are no systemic problems in our personnel practices, it did identify a few issues that we, like you, wish had not arisen during the change in administrations and the transition process.

As the Report notes, we have already instituted procedures to correct the issues that you identified as occurring in the first two months of the Administration. In fact, we had essentially resolved these issues during those first sixty days, with later retroactive steps addressing those personnel concerns that arose in the earlier period.

To place the Report in context, it is important to recognize that most retroactive appointments discussed in the Report were taken to protect Executive Office of the President agencies, including the White House Office, from overextending their budgetary limits in response to the extreme demands of the Presidential transition. Until we knew exactly how many appropriated dollars remained from the previous Administration, we were necessarily cautious in authorizing staffing levels. As the budgetary facts were determined, we approved staffing levels and refined personnel procedures and budgetary controls.

As a matter of fairness, we also wanted to make sure that those who performed work were compensated at the appropriate levels. Thus, retroactive pay actions included both increases and decreases, as the Report finds. These corrections ensured that employees received due compensation for the work they had performed.

Finally, as the Report found, there were no violations of the law and any questionable actions have been or are being remedied. This evidence, therefore, does not support the suggestion that legislative action is needed to restrict the President's authority under Title 3.

-- 2 --

Indeed, there is no need to upset the careful balance struck by Congress, which allows the President requisite flexibility in hiring and paying his immediate, personal staff. The scrutiny given Presidential action, as well as the statutory caps on salary levels, curb the possibility for abuse. On the other hand, limiting the President's authority in this area could gravely undermine the ability of future Presidents to respond to changing needs and demands, especially during the start of a new Administration.

We hope these comments contribute to a clear understanding of our transition effort.

Sincerely,

W. David Watkins

W. David Watkins
Assistant to the President for
Management and Administration

Appendix IV

Major Contributors to This Report

General Government Division, Washington, D.C.	Larry H. Endy, Assistant Director, Federal Human Resource Management Issues Edward R. Tasca, Evaluator-in-Charge Terry L. Draver, Senior Evaluator
Office of the General Counsel, Washington, D.C.	Michael R. Volpe, Assistant General Counsel V. Bruce Goddard, Senior Attorney

Mr. HOYER. Thank you very much, Ms. Kingsbury.

The GAO report states, as you have indicated, that Title 3 of the U.S. Code has been interpreted to provide authority to the President to make retroactive pay increases for employees, as long as they were actually performing duties for the Executive Office of the President.

Does this mean the personnel actions addressed by GAO, as you have just said—and I want to make it clear for the record—are considered legal?

Ms. KINGSBURY. Yes, sir, we did find them to be legal. I think it is less the interpretation of the law at the bottom line than it is the language that I just read to you. That is a very broad statute.

Mr. HOYER. Your report also states there is a possibility that this authority could be abused and that Congress may want to consider legislative action on this issue. Have you brought this matter to the attention of the Post Office and Civil Service Committee?

Ms. KINGSBURY. Yes, sir, we have. We routinely distribute reports to them, and I have also held discussions with the staff director of that committee.

Mr. HOYER. Your report states that of the 611 new personnel appointments made between the 20th of January and April 24th, 38 percent were retroactive.

What was the total retroactive salary payment for these 230 appointments?

Ms. KINGSBURY. The precise total was $335,787.

Mr. HOYER. Of the 230 retroactive payments, what percent were affected for more than one pay period?

Ms. KINGSBURY. About 19½ percent. It was 45 of the 230.

Mr. HOYER. So about 20 percent?

Ms. KINGSBURY. About 20 percent.

Mr. HOYER. Your report states 56 employees received salary increases and 11 received salary decreases. So there were both increase and decreases.

Ms. KINGSBURY. Yes, sir.

Mr. HOYER. Presumably to correct the paperwork and the misunderstandings. Your report in fact indicates that sometimes the personnel hiring directions were given verbally and were not carried out until sometime later. The report states that 56 employees received, as I said, increases, 11 decreases.

Are these 67 employees included in the 230 we just discussed?

Ms. KINGSBURY. Twenty-three of the 67 received both retroactive appointments and then at a different point in time, a retroactive action was taken to adjust their salary. So 23 of the 67 are in the 230.

Mr. HOYER. What is the total net amount of the salary adjustments for these 67?

Ms. KINGSBURY. I assume you mean the increases minus the decreases. The 58 salary increases for the retroactive periods totaled $502,106 and the decreases were $159,400, which I calculate, this is my subtraction last night, $342,706 in net salary adjustments.

Mr. HOYER. I don't believe your study covered this, however, do you know if at any time, the salary adjustments caused the White House to exceed the total sums appropriated in 1993 for salary expenses?

Ms. KINGSBURY. We don't know that. We did not look at that.

Mr. HOYER. Your report states 25 employees were paid by both GSA and by the Executive Office of the President. Those are the employees to which you referred in the latter part of your statement?

Ms. KINGSBURY. Right.

Mr. HOYER. And are they included in the 230?

Ms. KINGSBURY. Fifteen of the 25 are included in the 230.

Mr. HOYER. Again, because only 15 were retroactive?

Ms. KINGSBURY. Right. Fifteen of those 25 people, their appointments were made retroactive to some earlier date.

Mr. HOYER. Adding these together, 25 employees including the 230, and the total amount of dual payments for these 25 employees, what is the total amount in question here?

Ms. KINGSBURY. We calculated the amount owed to be $9,600 and some change. GSA is doing independent calculations that back out the various deductions and all that sort of thing. So the actual final bill may add up to something a little different from that.

Mr. HOYER. Am I correct then from your testimony that based upon, again, all of this, your conclusion was that there was no illegal activity effected?

Ms. KINGSBURY. The appointments, various increases and decreases, were legally proper.

PRESSURE FROM WHITE HOUSE TO ADJUST FINDINGS

Mr. HOYER. This is my last question. There apparently was at some point in time an allegation made that GAO, either yourself or those working with you or through you, was pressured by the White House to alter its findings concerning Title 3 authority with respect to retroactive pay increases. Do you believe that there was any such pressure?

Ms. KINGSBURY. Absolutely not. We held discussions with them, but—and we also held extensive discussions internally, but that was definitely our decision, and there was no pressure.

Mr. HOYER. I have a couple of other questions that I will ask at the next round.

Mr. Lightfoot.

DUAL PAY

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

Ms. Kingsbury, good morning again. Thanks for being here today.

Just a quick follow-up on one of the Chairman's questions. You mentioned that the retroactive dating was proper. How about the dual pay? Was that legal?

Ms. KINGSBURY. We didn't actually look into the legality of it per se because the White House agreed, once we pointed it out to them, that it wasn't proper under whatever standards you want to use, and they immediately started taking action. So it didn't rise to the sort of issue we would have to analyze legally.

Mr. LIGHTFOOT. Would they have taken action had it not been brought up, or would they have even known about it?

Ms. KINGSBURY. I have no way of knowing that. They might not have known about it—excuse me, I take that back. They knew about some of them, because some of the employees had already made some payments back when we started looking into it, but I think we were the ones who identified all of the affected employees.

Mr. LIGHTFOOT. Because on your October 8th response to my letter you listed here a couple checks dated on May 3rd, and there were some that came back later.

Ms. KINGSBURY. Right.

Mr. LIGHTFOOT. Something that came out of your report that we haven't discussed that struck me, out of the EOP agency, we had a total of 611 appointments, 230 of these were retroactive appointments. But when you go through the breakdown, 444 of that 611 were in the White House office and 205 of the retroactive appointments were in the White House office, and the other agencies didn't seem to have many—well, like the Council on Environmental Quality, we had three, National Security Council had 17, that sort of thing.

Was there any indication in what you saw that there seemed to be more—it leaned more towards the White House than the other divisions of EOP?

Ms. KINGSBURY. I might defer to Ms. Thomasson to answer that question.

We didn't actually investigate that. Many of the reasons that we were given for those appointments being retroactive were the press of business in the White House office. That is about all I can offer you on that.

GAO DRAFT REPORT POLICY

Mr. LIGHTFOOT. The Chairman made a good point a minute ago of some things that have been said. Maybe we can clarify that a little bit.

Could you describe for us what your agency's policy is with respect to the different drafts of the report—what is the difference between the discussion draft and the final draft, the discussion draft which is basically given for comment and so on?

This seems to be where a lot of, I think, this came from, that there was a difference between the discussion draft and the final draft. What are the differences between those two documents and who do they go to and why?

Ms. KINGSBURY. Well, the process of reaching closure on a GAO report, because it is an institutional product, is a fairly intensive and iterative process. It helps to put things down on paper for purposes of discussion, and in fact there are—I haven't counted them on this job—but there were probably considerably more than three versions of this at one time or another.

It is standard policy in our work when we have reached a point where either we have enough facts to begin to shape a message and a story and/or we have an analytic position that we want to lay out for discussion, to put it down on paper and take it to the agency, and to discuss it with them in its specific written form.

Usually we do this as a routine process. Nobody worries about releasing it to anybody because it is a discussion—it is for discussion purposes. That is how I would characterize the discussion draft that we gave the White House on August 27th.

I think it is important that the fundamental conclusion that we carry forward into our final report, that these actions—that we could find no basis to argue that these actions were not legal, had been made prior to the issuance of that draft.

It was also true that for several of the salary increases, the stories in these particular cases were still incomplete. We had not gotten all the information yet from the White House. So it served the purpose of illiciting that information as well.

It is also common practice in our work, and we try very hard to do it most of the time, to issue a draft to the agency for comment, for formal comment to allow them to provide a written document which we then include in the report. The second of the two drafts that you refer to, the formal comment draft would be what we called it, was issued to the White House, having taken into consideration the additional facts they gave us and the discussion we had with them the previous week.

Does that help you? Jim, do you want to add anything further? You were a party to some of these processes.

Mr. HINCHMAN. Obviously, Mr. Lightfoot, we are aware of your concerns about how we came to our conclusion regarding the legality of the Title 3 actions, and that concerned us. I would only try to add a kind of personal statement about how I think that thinking evolved.

We came to this work, as Nancy has said, steeped in Title 5 and inexperienced in Title 3. As we first began approaching the Title 3 questions during that summer, we tended to import into that our learning from Title 5, which, as you know, is an enormous network of statutory restrictions and General Accounting Office decisions and OPM regulations.

As we began to approach the point of producing a draft, we began to have some uncertainties about whether in fact, given the enormous sweep of the language in Title 3, we could do that. And as Nancy has said, in the meeting before we issued the August 27 draft, we had explicitly reached a conclusion that we could not say that those actions were illegal under Title 3.

We remained concerned that there were some implications of that broad language that perhaps were inconsistent with what Congress would consider appropriate in terms of the operation of the White House, although we were not certain about that. We were looking at some limited legislative history from the Title 3 enactment.

The word "questions," which is the one that is used in the August 27 draft, was meant to capture that flavor, that unwillingness, inability to say they were legal but uncertainty about the broader implications of the Title 3 language. Obviously that wasn't perfect language, as Nancy has said. It was intended for discussion purposes with the White House. We were still seeking additional information when we came to the formal comment draft, and ultimately in the final draft, we changed that language to be more explicit about our finding of legality.

But we never meant to change our fundamental conclusion. We really were struggling to refine the articulation of views on an issue which, as I said, we came to for the first time this summer, and I think struggled a bit over the first part of that work. I don't know any other way to describe that. And that is as honestly as I can describe how those drafts evolved.

Mr. LIGHTFOOT. I appreciate that. The thing, too, I think is that we are not questioning your conclusion that there was nothing illegal done as far as the back-dating is concerned. It is a matter of opinion if this was the ethical thing to do or if it violates general practices you find in the business world. A lot of people would agree that it does. And you didn't, as you said, go ahead and determine if the double dipping and so forth was legal or not, because that wasn't the specific point of the study in the first place.

IMPROPER DVAL PAY

Mr. HINCHMAN. I don't mean to interrupt, but I want to be clear about our views. Clearly—I don't know what legal or illegal means. People are not entitled to be paid out of transition funds who are not in fact on the payroll of the transition, and I think the White House agrees with that and these people had left the transition payroll and gone to the White House payroll, and the funds inadvertently paid to them after they transferred to the White House needed to be repaid and the GSA is in the process of collecting those funds.

Mr. LIGHTFOOT. Do you know where we are in that scenario?

Ms. KINGSBURY. GSA has—the manager for the transition account at GSA is preparing bills for all 24 employees, 24 of the 25 still owe additional money, and will be sending those bills either today or Monday, we are told, from GSA.

Mr. LIGHTFOOT. Along with your explanation on the difference in the drafts, one of the questions that continues to hang around is because the discussion draft got leaked. By whom no one knows at this point anyway, or if they do, they are not saying.

Ms. KINGSBURY. They rarely do.

Mr. LIGHTFOOT. Yes, it is interesting how things happen in this place. If you ever want to know how to design a sieve, come to DC. Anyway, the first draft that got released in the press said, "We do not believe the President has unfettered authority to make retroactive pay adjustments without any limitation." Then in the final draft, that statement was left out, and instead, statements like "We conclude the retroactive pay increases were proper."

Does that go back to what you were just trying to tell me, why you did that?

Mr. HINCHMAN. Yes, plus an additional fact that at the point that we were preparing the first draft, we didn't know the scope of the retroactive increases. As the information developed further, I think it is fair to say, it became clear to us that we were not talking about what I would call very large sums of money, enormous adjustments. And so this concern about the broader implications, the possible sweep of this Title 3 authority, turned out not to be relevant to the cases that were before us in this situation.

At the same time, we did still raise in the final draft the issue about this potential, and as you have pointed out, Mr. Chairman,

we indicated that Congress may wish to consider whether there is a limit to this Title 3 authority that it wishes to clarify. That point is raised and, as Nancy has indicated, we have discussed that with the committee of jurisdiction.

Mr. LIGHTFOOT. The reason I bring the question up is because in some of the discussions that we all had with you folks, the staff had with you and so on, the word inappropriate came up in several of those discussions as it related to the back-dating, and then when we get the final report it is not inappropriate. And we are just trying to get to why that changed.

TITLE 3 AUTHORITY

Ms. KINGSBURY. As Jim said, our legal analysis carries a lot of Title 5 with it and my own experience carries a lot of Title 5 with it.

I spent 12 years of my life in the Office of Personnel Management; I was involved in the civil service reform initiatives in the early 70s and so forth. When we first looked at these things, they didn't look right. They looked like there could be something wrong. And we spent a fair amount of time over the summer struggling with what it is we could say was wrong. And in the end, we didn't find that we had a basis to say that. And that is just an intellectual process we went through.

Jim, do you want to add to that?

Mr. HINCHMAN. I'm beginning to repeat myself and I don't want to take the committee's time. In the final analysis, it comes down to the language of the statute, and the statute on its face frees the President from all laws that otherwise govern personnel actions in the Executive Branch. As you know, there is contained within it a limitation on the total pay ceiling for individuals, but other than that——

Mr. LIGHTFOOT. One of the things, too, I think the Chairman alluded to this earlier, you have made some recommendations to the Post Office and Civil Service Committee on how we should address this thing?

Ms. KINGSBURY. We haven't made specific legislative recommendations. We have discussed it with them, and we will be happy to have further discussions with them on that.

ACCESS TO RECORDS

Mr. LIGHTFOOT. One final question. In conducting an investigation, and I don't mean this in any way personally, but just within the structure of your agency and the rules you have to operate under—and I understand that Mr. Clinger and some others are going to have a hearing on this to look at that—if Mr. Hoyer, say I am the GAO and Mr. Hoyer asks me to investigate something in your agency and say you are the ABC agency for lack of anything else, in essence what I can do is come to you as the GAO and say, "Ms. Kingsbury, here are some things we would like to see; would you please provide us with the information and documentation to back this up."

And then as the investigator, all I have really got to work with is what information you are willing to give me. Is that basically correct?

Ms. KINGSBURY. Well, we have the capability and resources to go collect information not only from a source like that but from other places as well. And normally it is not a problem. We have rules internally that if we collect information, to the maximum extent possible, we verify it from other sources, we talk to people, we deal with judging the efficacy of the evidence that we get.

In this particular case, because there was no requirement for the White House to have documentary evidence, we asked them to provide it. To be fair in reporting the stories or considering the stories, we took that documentation at face value. Had we been able to find some other source, we would have gone to some other source. It was the best available evidence in this case. In most other cases, we go to other sources as well.

Mr. LIGHTFOOT. One of the things in your October 8 letter and some other things that you have done—again, we appreciate you answering all the questions in detail as you did—it appeared there was some difficulty in determining if some of these people actually were at work at the time that they were supposed to be at work, because of not a complete record of time cards. You ended up with some basically undated memos that were produced to indicate some of these folks had worked.

And then, what made it interesting being on the other side of the table here for some time, during the Bush administration, the GAO very firmly chastised them for inadequate paperwork and documentation on detailees.

It appears here we have got a situation where you have a good degree of difficulty in determining if some of these people were even in the White House or even working at the time they allegedly were working and were paid for. It seems to me there is a little difference of opinion there.

Ms. KINGSBURY. It is not a difference of opinion. I would argue two things about that. First of all, we tried several other sources to make that determination. We went, for example, to the Secret Service to see if the records of passage in and out of the White House would be a reasonable source to see if they were working. We discovered that wouldn't work either because there are ways of getting in and out of the White House such that the individual doesn't pass through an electronic device.

In the case of detailees, they are subject to Title 5, so we have a different set of rules under which to make those kinds of judgments. And when we have rules and criteria, I think we do come across and state our views under those rules.

In this case, with the breadth of this statute, we didn't have any basis for doing that. The White House legal counsel in its opinion said that it was necessary for these people to have worked, but in prior discussions with the White House, some of the lawyers had argued to us that even that restriction wasn't legally required.

So they clearly backed away and agreed that these people should have actually worked. But they haven't gone so far as to agree that there should be proof that they worked. And we did the best we could.

Mr. LIGHTFOOT. Maybe I am stepping out of bounds, but wouldn't it have been a good recommendation from your agency that records be provided and be kept on employees so that you have some rea-

sonable assurance that they actually were at work, not just for this administration, but future ones down the road.

If you set the precedent here that you can retroactively put people on the payroll but you don't have to prove they ever came to work, it looks to me like you are setting up kind of a dangerous precedent in years down the road. It doesn't make a difference what the party is down there, whoever is in the White House.

Ms. KINGSBURY. Again, you have to go back to the criteria you would use to do that. In the rest of the government, there are regulations which require such recordkeeping.

I note in passing, by the way, that the National Performance Review is attempting to change some of that and to go to exception recordkeeping for time keeping. I am personally concerned about that, but under the authority of the law that states without regard to any other employment law, we don't feel that we have the basis to argue to the White House they should do something that the law clearly says they don't have to do. I mean, it would be good business practice, I would agree with you about that. But we tend to need a basis to make such recommendations to the President.

Mr. LIGHTFOOT. That is kind of a confounding statement. As Mr. Darden mentioned, we operate under basically the same rules as the President does as far as operating offices is concerned. I would be in deep you-know-what if I had people on my payroll and I couldn't justify it to the folks back home, because it is a matter of public record.

WHITE HOUSE PAYROLL

Which brings up a point I wasn't going to bring up with you, but no one is able to get their hands on the list of who works at the White House, how much they are paid, and what they are down there for, and they are being paid with U.S. tax dollars. Why is that?

Ms. KINGSBURY. I will defer to the White House representatives for the answer to that question. I understand that they have that position, but I don't know why.

Mr. LIGHTFOOT. Even Mr. Rostenkowski right now is taking a lot of heat because he supposedly has some missing payroll records. It doesn't look to me like he ought to be taking heat that the White House isn't taking. Personal opinion.

Thank you, Mr. Chairman.

Mr. HOYER. Mr. Hinchman, you say that the law frees the President from all laws. Am I correct that no elected official is governed by Title 5?

Mr. HINCHMAN. That is correct.

Mr. HOYER. No elected official?

Mr. HINCHMAN. That is correct.

Mr. HOYER. So the President is in the same position that every other elected official in Washington, D.C. is in, am I correct?

Mr. HINCHMAN. If you mean, Mr. Chairman, with respect to the applicability——

Mr. HOYER. Title 5.

Mr. HINCHMAN. Yes.

Mr. HOYER. Mr. Visclosky.

ABUSE OF TITLES 3 AND 5

Mr. VISCLOSKY. Thank you, Mr. Chairman.

There has been a lot of talk about Title 3, and in your summary and testimony today, you indicate that recommendations have been made to prevent possible abuse. Was there any conclusion in your report or would it be your position that there was any actual abuse of Title 3?

Ms. KINGSBURY. All of the actions we looked at, and we looked at them in considerable detail, we could find no basis to conclude they were not legal. And therefore, there is hardly any basis to conclude they were an abuse of some sort. You have to be abusing some law, and they are clearly not in breach of the law in that regard.

Mr. HINCHMAN. I would just add that as I said earlier in response to Mr. Lightfoot's question, one of the things that happened as we gathered more information, we learned that the amounts involved in these cases were in fact relatively modest and there were stories associated with each of the cases, so we are not in that sense looking at some gross abuse of authority which was granted to the President. There were decisions made for a variety of reasons. There are stories associated with all of them. They were not abusive situations.

Mr. VISCLOSKY. You mentioned that the total dollars involved for dual pay was about $9,600. Is that the total between the payments from the transition fund and the payroll?

Ms. KINGSBURY. It is the total of the overpayments to the employees involved, including their Social Security contributions and things of that sort. What they actually would have to pay back would be less than that, because some of those funds would be recovered from other sources.

RETROACTIVE PAY ADJUSTMENTS

Mr. VISCLOSKY. Relative to the retroactive salary adjustments, there were 30 of those, am I correct in understanding that eight out of the 30 were downward adjustments?

Ms. KINGSBURY. Eight of them were downward adjustments. One person had an upward adjustment and downward adjustment. They couldn't make up their minds what they wanted to pay him.

Mr. VISCLOSKY. And when you say in your testimony most of those adjustments were for an amount under $400, I assume that means more than 15 of those were for an amount——

Ms. KINGSBURY. I can get you the precise amounts in that distribution. I don't think I want to go beyond the statement that I made today. I don't know the exact number. We usually only use the word most when it is a majority, so I would assume that is the case.

[The information follows:]

For 12 of the 22 employees, the retroactive payments were less than $400. Retroactive payments to the 22 individuals ranged from $58 to $3,720.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. HOYER. Mr. Wolf?

WHITE HOUSE TRAVEL OFFICE

Mr. WOLF. Thank you, Mr. Chairman.

Welcome to the Committee. I think most of the questions have been asked. Let me take a different route, based on the conversation we had a couple of weeks ago.

Have you had any more success in meeting with the people at the White House, the seven travel office employees?

Mr. HOYER. I know how strongly the gentleman from Virginia feels about that, but I would like to confine this hearing to back-dating of personnel records. This is the subject of the GAO report.

Mr. WOLF. Well, okay, but I think this is important, though, because it gives you a little bit of an indication of how little—have you been able to interview Mr. Kennedy or Mr. Watkins or Mr. Nussbaum about that?

Mr. VOLPE. We have interviewed Mr. Nussbaum and Mr. Kennedy. We have not interviewed Mr. Watkins yet.

Mr. WOLF. Are they going to make this available? Are they going to make the employees available?

Ms. KINGSBURY. They are still telling us they will. But that, as the Chairman says, is a somewhat longer story than we have to deal with here. I would be happy to come up and keep you posted on that.

Mr. WOLF. I would be happy to do that.

The reason I raise this, and I think it is important for the committee to know, yesterday the Congress passed a bill in the Transportation appropriation to reimburse the five individuals, seven individuals for their legal fees. And it is my sense that this has been dragging on for so long that there is an effort being made to perhaps find something that they can indict one of these people or charge one of these people to justify some of the actions.

SLOPPY RECORDKEEPING

So you were answering Mr. Lightfoot's question about how available the recordkeeping was, which clearly was a sloppiness on the part of the White House. You would acknowledge that with regard to this, that there was a sloppiness?

Ms. KINGSBURY. Yes, sir. These records were not up to date in the early days of the administration. That is clear from our report.

Mr. WOLF. And these were people that were running the White House, basically.

Ms. KINGSBURY. Yes, sir.

Mr. WOLF. And now we have five career Federal employees, you are career, all of you——

Ms. KINGSBURY. Yes.

Mr. WOLF. Who have legal fees of well over $30,000 apiece now. And I think it is important that you pursue interviewing all seven, and Mr. Kennedy and Mr. Watkins and Mr. Nussbaum, because I don't know that we are going to be able to have a hearing on it. But I want you to know that I am going to be aggressively watching what your report is to see if the process has been any political influence involved, to see if that is open, because I think we are going to be faced with the same problem here that some Members are concerned about with regard to the back-dating.

So I think there is, Mr. Chairman, a direct connection on that.

Ms. KINGSBURY. We intend to pursue all of those matters that you mentioned, sir, and at the first moment that we come to the conclusion that we are not ultimately going to be able to do that, we will be back up to tell you about it.

Mr. WOLF. The last question, who is your contact point at the White House? Who is in charge of coordinating the ability for you to interview and not interview?

Ms. KINGSBURY. Representatives of the legal counsel's office.

Mr. WOLF. Who is that?

Ms. KINGSBURY. Who is the current—Neal——

Mr. VOLPE. Neil Eggleston has been coordinating the interviews with us. I can't remember the name of the counsel right now who is actually in charge of the operation.

We had our entrance conference, Mr. Wolf, with Roy Neel, the Deputy Chief of Staff, when we opened this job on the travel office.

Mr. WOLF. What was your success, then, with the two——

Mr. HOYER. Can we conclude this part——

Mr. WOLF. With the two that retired, they clearly are not covered by anything. Have you been able to interview the two——

Ms. KINGSBURY. Their attorneys have refused to permit us to interview them. We have asked, we have been in touch with all of the attorneys, but as long as the criminal investigation is pending, their attorneys have refused to permit it.

Mr. WOLF. This is the last question, Mr. Chairman. Is there still a criminal investigation under way——

Ms. KINGSBURY. According to the Justice Department there is.

Mr. WOLF. There is?

Ms. KINGSBURY. According to what the Justice Department says, there is. We have no other evidence.

Mr. WOLF. So these five people or seven people are still potentially able to be indicted, yet they have—have they gotten five jobs for the others?

Ms. KINGSBURY. Our understanding is offers have been made. We do not have evidence about acceptances.

Mr. WOLF. I have no other questions, Mr. Chairman.

Mr. HOYER. Again, I want to give Mr. Wolf some latitude, but the Chair does not want to go beyond the scope of the hearing. I understand the gentleman's contention, and I appreciate that, and that is why I wanted to let him ask the questions, but I really do want to limit this hearing, at least, to the issue that was raised in the GAO report.

Mr. WOLF. Well, Mr. Chairman, does that mean when the White House witness comes, we can't ask with regard to the passes and—otherwise I don't want to participate in the hearing, because I think that has a direct bearing on the White House passes—I have raised the issue, there are a number of things I have asked with regard to personnel charts. We haven't been able to get them, so I think these all bear kind of together.

If you don't want to get into the travel gate office, I won't get into that. But to say we can just limit it to the back-dating means you can't deal with the other issues directly tied to it.

Mr. HOYER. I will tell the gentleman, he was not here when Mr. Lightfoot made his initial comments which I appreciated. Mr.

Lightfoot and Mr. Wolf and Mr. Istook asked for a GAO report. Mr. Lightfoot asked for a hearing on that GAO report. We are having the hearing on the GAO report. It dealt with a very specific set of circumstances raised in the letter that was sent to GAO, and it would be the Chair's intent and hope that we could limit it, not because these other issues aren't issues I know of concern to the gentleman from Virginia and others, but because GAO came prepared to speak to this issue. So that is——

Mr. WOLF. For GAO, I understand that. Okay.

Mr. HOYER. Mr. Darden.

Mr. DARDEN. Thank you, Mr. Chairman.

First of all, Ms. Kingsbury, do you or any Member of the panel, are you in a position to tell us when Title 3 was last amended or revisited by Congress?

Mr. VOLPE. The changes to Title 3 occurred in 1978, and that language first appeared there. To my knowledge there have been no substantive amendments enacted or changed by Congress since that time, 1978.

Mr. DARDEN. So then the provisions on which you base your opinion have been in law at least since 1978; is that correct?

Mr. VOLPE. Yes.

BACKDATING IN PRIOR ADMINISTRATIONS

Mr. DARDEN. Secondly, I realize your charge did not involve this, but was there any investigation, any inquiry done as to what had been the course of conduct as to any back-dating in payroll records in previous administrations?

Ms. KINGSBURY. There were a number of allegations that what we saw in this particular case was different from what had happened in previous investigations, and we inquired about whether there were records that we could turn to to assess that. When we learned that there were no records, we did not follow that part of the story any further. It would have been very difficult to reach a conclusion on that matter if we couldn't actually look at records.

Mr. DARDEN. So there were no records in existence as to what might have been the course of conduct in previous administrations, correct?

Ms. KINGSBURY. Right. We relied for a lot of this work on automated payroll records and those tend to be purged after a certain period of time, so the records were just not available.

Mr. DARDEN. As you may know, we in Congress, every individual Member, either himself or his agent, must merely certify at the end of a pay period that the persons whose names appear on the payroll did in fact perform the services that have been compensated. Is that the same as in the White House? Does somebody say these people are on the payroll.

Ms. KINGSBURY. I would assume that certification requirement comes out of House rules or something. I am not particularly familiar with it.

The White House has no requirement for supervisors to certify that people actually worked. They do have a process for documenting payments over and above the regular work week and adjustments to pay. We have seen some of those.

We asked for certifications for some of the cases in order to assure ourselves that there was somebody in the White House willing to certify to that, at about the same level of detail that you certify in your office. And that is the records we actually got.

Mr. DARDEN. The White House doesn't require time cards?

Ms. KINGSBURY. That is correct.

Mr. DARDEN. So essentially the requirements in the White House are about what they would be in the Congress; is that correct?

Ms. KINGSBURY. Sounds like it. You may actually go one step further under the House rules than the White House does on a day-to-day basis.

Mr. DARDEN. Thank you.

Thank you, Mr. Chairman.

Mr. HOYER. Mr. Istook?

Mr. ISTOOK. Thank you, Mr. Chairman.

I appreciate your coming and being with us today. I realize that a major part of the discussion is the leeway that is necessary for any President to have on many personnel matters. We are here to discuss the fact that the President must be held accountable. He gets leeway but people need to know what he is doing so people can make their own value judgments as to whether he exercised proper discretion in that.

ACCESS TO WHITE HOUSE PAYROLL RECORDS

I realize Mr. Lightfoot touched on this, and you were perhaps reluctant to get into it, but I did want to discuss with you, because it was an important part of your methodology, the availability of the information about who was on the White House staff, who was working for the Executive Office of the President, and how much were they paid.

In conducting your inquiry, were you granted full access to that information?

Ms. KINGSBURY. I think the answer to that question is that we were granted the access sufficient to answer the specific questions we were addressing. We did not ask for and there had been some expressions of concern on the part of the White House that they did not want us taking out of the White House environment information about individuals and what they were being paid. There was considerable concern expressed about that.

Mr. ISTOOK. Was that expressed to you personally?

Ms. KINGSBURY. Yes, sir. And we—because we did not need that kind of information for purposes of the questions that you and Mr. Lightfoot and Mr. Wolf had asked us to address, we did not pursue the matter with them.

Mr. ISTOOK. With whom at the White House did you discuss this?

Ms. KINGSBURY. I believe it was Patsy Thomasson, and several other staff members, but she was the lead——

Mr. ISTOOK. That would be the highest-ranking person that was in the discussion in the White House?

Ms. KINGSBURY. Yes, sir.

Mr. ISTOOK. What did they tell you was the reason that the White House did not want the General Accounting Office to have the information on who was working at the White House and how much they were being paid?

Ms. KINGSBURY. If I recall the conversation, the concern was that that was a matter that was private to the management of the President's White House, and there was considerable concern that if that information left the environment of the White House, it would become public through leaks or some other way. We tried to say we didn't think that would happen, at least insofar as our custody of the information was concerned, but again, because we didn't need that specific kind of information to do our work, we didn't pursue the matter.

Mr. ISTOOK. What were you told by Ms. Thomasson was the reason that the White House did not want the public to know how much they were paying the people to work there?

Ms. KINGSBURY. We didn't have a discussion on those terms. I didn't pursue the matter as a representative of the public in that sense.

Mr. ISTOOK. Was any information ever advanced as to why the public should not know what people are being paid at the White House?

Ms. KINGSBURY. No.

Mr. ISTOOK. But you looked at, in some cases, payroll documents, at least for certain persons whose records you examined. Did you have the access to that information on who was being paid and how much?

Ms. KINGSBURY. Yes.

Mr. ISTOOK. But that was only for a limited number of persons?

Ms. KINGSBURY. That is correct, the ones whose appointments were covered in the period of time that we were dealing with, and then we focused more specifically on the individual cases and the retroactive payments. We did look at some other salary runs for purposes of verifying that we had been given all of the information we needed for our job. But we did not copy that information or take it away with us.

INEFFICIENT DATA COLLECTION

Mr. ISTOOK. So whether it was in a small number on some individual records that you were looking at the salary information and the paperwork associated with it on a limited number of White House people, whether it was for that or for the White House in general, they did not permit you to make copies or take any information from outside to remove them from the premises of the White House?

Ms. KINGSBURY. We certainly made notes and took those. We had agreed because of the concern about the linkage between salaries and individuals that we would code that information that we took with us so that if somebody stumbled across a given document that would not provide that full information. That is the sort of accommodation that we would make routinely to an agency who was concerned about a particular matter outside the scope of our work.

But we did take the information we needed. We have the work papers we need to support matters in our report. What we don't have is extensive information about everybody who is working at the White House.

Mr. ISTOOK. Did that make your work more difficult, the fact that you could only look at certain documents within the confines

of the White House and could not take copies back to your normal working area at the GAO?

Ms. KINGSBURY. I believe it introduced a considerable inefficiency in what we did. The particular concern or inefficiency was that we were not provided any of these records in electronic form on diskette. If we went to another agency and asked for payroll records, it would be relatively routine for them to download these records onto a computer disk for us and we would walk off with it and do our analysis without having to go through the process of entering stuff ourselves into the computer.

We were not permitted that luxury in this situation, and because we tend to believe that we are successful in the long run because we persevere under such limitations, if you want to call it that, we just simply wrote things down on paper and entered them into our own computers from those sources. Again, honoring the agreement I had made not to have a lot of documents lying around or keeping salaries and names on the same piece of paper.

Mr. ISTOOK. Did you make a request of Ms. Thomasson that you be provided the information on computer diskette so that your work——

Ms. KINGSBURY. Yes, we did. And we were refused.

Mr. ISTOOK. And you were refused.

Ms. KINGSBURY. Yes, sir.

Mr. ISTOOK. How many times did you request that?

Ms. KINGSBURY. Personally, I didn't. How many? Four or five.

Mr. ISTOOK. Four or five?

Ms. KINGSBURY. Yes.

Mr. ISTOOK. Were those requests all within a couple of days, or was this a continuing request that was over a period of weeks where you were saying this is really tough to do this way; this is so inefficient, it is costing us so much time and manpower, can't you just do what everybody else in the government does and just download the information onto a computer diskette?

Ms. KINGSBURY. We may have said that once or twice. I suspect that the subsequent requests had to do with when we needed additional information, couldn't we get that on a computer, that sort of thing.

Mr. ISTOOK. And every time you were refused?

Ms. KINGSBURY. Yes, sir.

Mr. ISTOOK. You used the term "this introduced considerable inefficiency." Would you elaborate on that?

Ms. KINGSBURY. Well, the difference is if you receive a diskette with data that comes directly from a payroll system, you can begin to analyze that data immediately. We ended up putting several staff members into the White House, in the space we were given in the New Executive Office Building over a period of a couple of weeks to laboriously go through the records, both the payroll records and the personnel files, and take notes, because they didn't want copies of these materials leaving the building. That is the way we did our work a lot before computers were invented, but it is a relatively rare experience now.

Mr. ISTOOK. In fact, can you recall any time in recent years where you have had to labor under such a handicap?

Ms. KINGSBURY. Some of those same conditions in Travelgate.

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Mr. ISTOOK. Only in the White House.

Ms. KINGSBURY. But it tends only to be in the White House. There are other constraints in work I used to do with the Department of Defense where sometimes because of national security concerns, things are not very efficient. But it is also true that I think we have to say that we recognize that the White House is a different situation. I mean we would not expect the White House to simply open the door, stand aside and give us a key to their file cabinets. That is something we might expect in another agency under some circumstances.

Mr. ISTOOK. Right. But you are not talking about file cabinets here, you are just talking about the records of who works at the White House and how much they are paid?

Ms. KINGSBURY. That is correct. And even in that context, assuming that our job was not to go determine who was being paid what in the White House, and our job was not that this time, we would not seek out that kind of information from the White House. If it was related to our job, we would have sought it.

Mr. ISTOOK. But you had to have access to that information, so you could look for backdating and retroactivity. I mean you had to have that access.

Ms. KINGSBURY. That is correct. And we did have that access for this job.

EXTRA STAFF RESOURCES NEEDED

Mr. ISTOOK. Right. But can you make a determination in terms of manpower, in terms of length of time, in terms of expense, how much extra did it cost the taxpayers because the White House wouldn't give you the simple cooperation of letting you do work by computer?

Ms. KINGSBURY. I think it would be difficult for us to make that determination, beyond my statement that it was not a very efficient way of working. This was a job that took us a total of four or five months. It is hard to tell how much less it would have been if we had had the computer information. I don't think it would have been significantly less.

Mr. ISTOOK. How many people and working for how long did it take to take this information, make handwritten notes about it at the White House, and then put that into your computer, rather than just simply getting the information directly downloaded from the White House? How many people working for how long to get that information?

Ms. KINGSBURY. We had three or four people working for a couple of weeks initially in the job to get the first cut of the basic information we needed. After that, there were only a couple of people working on the job at any one time, because new issues kept coming up and so forth. So I would have to put it down to only a couple of weeks of real inefficiency.

Mr. ISTOOK. With three or four people full time on that?

Ms. KINGSBURY. Yes, sir.

Mr. ISTOOK. Distinguishing between Title 3 and Title 5 employees, as you were discussing, the language of Title 3 is specific on how many people can be hired at particular rates of pay. How do you look at an employee and determine whether they are Title 3

or Title 5? I'm sure they don't have a badge around their neck that identifies them one way or the other. How do you determine who fits in which category?

Ms. KINGSBURY. Well, the Title 3 and Title 5 is reference to an authority to appoint someone to a government job. They are either appointed under Title 3, and their personnel paperwork will say that, or it will say they are appointed under Title 5. If you know where to look on a Standard Form 50, you can find that information fairly quickly.

Mr. ISTOOK. All right. As part of this work, did you ascertain whether the White House is in compliance with the limitations under Title 3 regarding the number of people at the particular rates of pay that are the limits under Title 3?

Ms. KINGSBURY. That was not a question we were asked to look at, so we did not examine that question.

Mr. ISTOOK. All right. Now, was there anything besides this payroll information itself that the White House said, you can look at, but you cannot copy, you can only look at here on the premises?

Ms. KINGSBURY. Well, I think the personnel files we examined would come under that category. I mean they did make the personnel files available to us. We were specifically asked not to make copies of the documents in them, so we took notes of the relevant information or lack thereof. In many cases, the staff noted "there is no information about why this retroactive action was taken in the file", and so that would lead to us asking another set of questions.

Mr. ISTOOK. Did that slow down the manner in which you were able to conduct your study?

Ms. KINGSBURY. I wouldn't say significantly. In a routine examination——

Mr. ISTOOK. But did it slow it down whether it was significant or not?

Ms. KINGSBURY. Well, normally we would make a copy and then if we had to go back and ask a second question, we would have the copy on our premises rather than theirs and we wouldn't have to ask to see the file again over there. I think we probably lost some time over those kinds of things.

DUAL PAY

Mr. ISTOOK. I noticed of course and you talked about it this morning, the people who were doubly compensated both by the transition team, which was Federal money and then compensated for the same time period through the White House. I believe you said 24 of the 25 still owe the money. Your report indicates, and I presume that you are talking about the same 24 people, that these particular 24 people still owe $9,676, and that that is extra pay that was given to them in January or February; it was uncovered in the middle of March, and yet this amount is still unpaid. Who was supposed to be reminding these people, you need to cut a check and get this $9,676 back in the Federal Treasury?

Ms. KINGSBURY. Well, I think it is very clear now that GSA views it as its responsibility and the manager for the transition account is going to be sending bills to these people. The earlier decisions to pay back were made at the White House, not at GSA, so I as-

sume that the White House feels some obligation to follow through on this as well.

Mr. ISTOOK. You say it is clear now that GSA is pursuing it. Has there been a turf battle, with the White House saying we shouldn't have to tell our people to pay it back, it is GSA's job, while GSA says the White House ought to do it? Why is it taking so long for somebody to figure out that you need to tell these people to pay back the money.

Ms. KINGSBURY. Well, in fairness to both the White House and GSA, the identification of the individuals involved and estimates of the amount of money involved were something that we developed relatively late in this job and provided to the White House only a few days before our report was issued in September. So although there was awareness back in March and April that there were a small number of people involved, the fact that there were 25 and the evidence about the amount of money was something that was only developed fairly recently. I think both the White House and GSA have moved relatively expeditiously to get the problem under control at this point in time.

Mr. ISTOOK. Would these 24 people have not known themselves that they were paid twice, once by the Transition Team, and once by the White House for the same period of time? Are they innocent in that they had no knowledge that they had cashed two checks?

Ms. KINGSBURY. It is not a matter of cashing two checks. What happened here was a set of overlapping pay periods. The pay periods that the White House uses and the pay periods that the Transition uses overlap. They were not coherent with each other and consequently, people knew that they had worked for the transition up to a period in time and gone to work for the White House. They got a check and presumed it was for the time they were working for the transition. You have to get down to the details before you can point to something in a given case and say no, there is a three-day overlap here and it is not proper for you to be paid for that.

Mr. ISTOOK. It might depend on how carefully you scrutinize your pay stub.

Ms. KINGSBURY. That, and what kind of careful records exist in timekeeping, and I think we have discussed this morning that the White House records in that regard don't exist.

PUBLIC AVAILABILITY OF PAYROLL RECORDS

Mr. ISTOOK. I appreciate that, Ms. Kingsbury, and Mr. Chairman, I would certainly note that we as Members of the Congress publish a report, and you can go through and find any member of this committee, for example, and see who is on our staffs and how much they are being paid, and I am glad that the House makes that information available to the public, and we don't feel that we have anything to hide. I wish the White House felt the same way.

Mr. HOYER. I appreciate the gentleman's observation.

Ms. Kingsbury, do such records exist for the Bush administration and do you know if they are available to GAO or anybody else?

Ms. KINGSBURY. Records of what, sir?

Mr. HOYER. The records that the gentleman was discussing.

Ms. KINGSBURY. I don't know, because I haven't looked.

Mr. HOYER. Okay. I would like you to look for them. I would like for you to look for the Reagan administration and the Nixon administration as well. This committee has never asked in the 10 years that I have been a member whether or not that is appropriate practice. You don't know whether it is a consistent practice of the White House, irrespective of party or particular holder of the office, to not provide such information?

Ms. KINGSBURY. Well, I need to get clarity about what information you are talking about. Are we talking about who was working and what they were being paid?

Mr. HOYER. Right. The individual personnel data.

Ms. KINGSBURY. We have not looked at it. I do have a memory of some information of that nature being released in the Bush administration, but it has certainly not been our experience that it is commonly available. But if you would like us to try to make an inquiry, we will. I am a little concerned about whether the records exist.

Mr. HOYER. Okay. Now, clarify one of Mr. Istook's questions. Did you have access to all of the information necessary for you to reach the conclusion and answer the questions asked by Mr. Lightfoot, Mr. Wolf and Mr. Istook, as to whether or not the actions were legal?

Ms. KINGSBURY. Yes, sir.

Mr. HOYER. And you concluded, am I correct, based upon the information which you have just said was appropriate and sufficient to answer that question that there was no illegal action taken?

Ms. KINGSBURY. Yes, sir.

Mr. HOYER. Mr. Darden.

Mr. DARDEN. Mr. Olver or Mr. Visclosky.

Mr. HOYER. Mr. Olver.

Mr. OLVER. Thank you, Mr. Chairman.

The question of record-keeping that has been brought up, this statute, as I understand, is a 1978 statute, and so we have had at least two transitions in-between. But you never have been asked to look at that, and as I understand it, the records either were not kept, which you don't really know, or they have now been destroyed, so there would be no way of examining what were the practices of the other two transitions since this very broad statute was in place.

Ms. KINGSBURY. That is correct.

Mr. OLVER. The records could have been kept, but if they had, they would now have been destroyed.

Ms. KINGSBURY. When we went to look at the rather narrower issue of whether retroactive actions had been commonplace in other transitions, we concluded that the records did not exist sufficient for us to make that determination.

Mr. OLVER. But you don't know whether they were just not kept or whether they have just been now destroyed.

Ms. KINGSBURY. And to be honest with you, we didn't try to see if they were in the archives or something. That did not seem to be relevant to the success of the investigation.

Mr. OLVER. Have you ever had occasion to look at the Congress' personnel records? Has GAO done that?

Ms. KINGSBURY. We have an assignment ongoing now covering the Office of the Architect of the Capitol. We have done occasional jobs of that sort, and we are going to be required, as I understand it, under the Legislative Appropriations Act, to monitor the downsizing and administrative cost reductions within the Congress. So if we haven't done it in the past, I am clearly aware we may have to do it in the future.

BROAD TITLE 3 AUTHORITY

Mr. OLVER. So I guess I was a little bit surprised that you were so surprised at the directive of the language under title 3 and that it took so long to realize that that was just broad language and leads to implications that there really isn't much required here by the language of the statute.

Ms. KINGSBURY. We just never looked at it before.

Mr. OLVER. I think that is pretty much the position I think of Mr. Hinchman. I think both you and Mr. Hinchman took care as to how you evolved over a period of time into a recognition that this language was very broad. It looks very broad to me, although I am not exactly a lawyer.

Ms. KINGSBURY. I think the time element involves both the analysis and perhaps more importantly, the effort it took to get the individual facts of the cases in question. That itself took a fair amount of time. We had to both get explanations and then having gotten explanations, we had to make the effort to get those explanations documented by the appropriate officials, and that took a considerable amount of time as well.

Mr. OLVER. Well, okay. The language of Title 3 does seem to be extremely broad, and the language does not require, at least the reading of it, does not require record keeping, and does not explicitly require that one needs to be present and working, although I think there is an inference certainly in the language where the language reads, "the President is authorized to appoint and fix the pay of employees in the White House."

Employees, carries for most lay people, and I pulled out the dictionary to see what one might say about it. But an employee is someone who works, is someone who performs some task along the way. And then it does read "in the White House."

So there is an implication that there is someone working in the physical confines, or maybe not the confines of the White House, because the White House has some implications beyond the building of the White House as to people being there. Now, would you concur that this does not require someone to be present and working?

Ms. KINGSBURY. I think the inference is to the holding of an appointment. Excuse me. I didn't mean to interrupt. I think employment means being in a position whether or not one is working, and the reason I raised that is that during some of our discussions with the White House, they pointed out that they had the authority within the Reagan administration to pay Jim Brady for a considerable period of time after he was injured and he was not working, and he was receiving his whole salary. We don't question that authority under this Title 3 language, and I think it means you have to consider working a little more broadly than you were doing.

Mr. OLVER. I see. But in any case, the language is indeed very broad.

DUAL PAY

Now, under the statute, you have concluded that indeed, and I think this is becoming extremely repetitious, that all of those actions under Title 5 and under Title 3 were in fact legal. But the overlapping transition office, I wanted to explore that for a minute. Twenty-five employees, let me see if I understand this correctly.

In 10 of these cases, it had already been discovered that there was some overlap and those were being corrected before you got into it; is my understanding correct there?

Ms. KINGSBURY. That is correct.

Mr. OLVER. But in nine of those cases the actual payments that had been made were not correct.

Ms. KINGSBURY. That is correct.

Mr. OLVER. One of them was correct in terms of the effort to try to reconcile this difference between the overlapping pay periods and the transition office and the White House. Nine of them, they had already discovered there was a problem and maybe had not corrected it correctly, and now the GSA is working on the actual billing for 24 people, the ones that you discovered in your processing of the—looking at the paper that also there was a problem with the overlap periods and those that had already been discovered, but were incorrectly corrected?

Ms. KINGSBURY. That is correct. And to be honest with you, I think you have to recognize that determining the amount of money is not an easy thing to do, because there are deductions from it. There had been deductions made; a couple of the employees actually returned the government checks they had received; the rest of them wrote personal checks. I am not sure it is as easy as that to determine exactly what the amount was, which is why GSA is now doing that from the position of the transition payroll manager.

LENGTH OF GAO AUDIT

Mr. OLVER. When did you start working on this investigation?

Ms. KINGSBURY. The whole investigation?

Mr. OLVER. Yes.

Ms. KINGSBURY. In late April.

Mr. VOLPE. The request letter was dated April 22nd, I believe. I believe April 22nd was the date of the letter from Mr. Lightfoot. And the entrance conference we had with the White House officials was in May.

Mr. OLVER. So it is roughly—today is the 22nd, six months ago today.

Ms. KINGSBURY. Yes.

Mr. OLVER. Tell me, how many people have been working on this investigation?

Ms. KINGSBURY. Well, for most of that period of time, there have only been two people working substantially on it, and one of those two people has other jobs to worry about. Michael and some of his colleagues in our Office of General Counsel have spent a fair amount of time on it. It is certainly not out of bounds for an ordinary job.

As a matter of fact, this one goes—has gone somewhat faster than some of the others we have. But there was a period of time when we had four or five people working on the job in order to get into the White House and get as much of the information as quickly as we could, given the constraints about not being able to get it on computer disk.

Mr. OLVER. You perhaps have already sensed what I was approaching here. I was curious how many people were working on this at various times, and it does apparently vary, depending upon just where you were in the investigation.

Ms. KINGSBURY. Yes.

Mr. OLVER. Over this six month period of time, how many full time equivalents would that average out to? Could you put any kind of a figure to that?

Ms. KINGSBURY. I could probably do that for the record, sir, because we keep time and attendance information that would permit me to look at that question, but I don't think I should try to do it in my head here, because I am running 40 other jobs, and on a day-to-day basis I don't always have a good idea exactly who is working on what.

[The information follows:]

We estimated that 2 full-time-equivalent staff years were spent on this review.

Mr. OLVER. But whatever it is, whatever number—what would be the most number of people who might be working on this at any particular time?

Ms. KINGSBURY. The largest number was probably five or six plus the lawyers.

Mr. OLVER. I see. So at any particular day during that six-month period, there might have been a half-dozen people putting their time into it on that particular day.

Ms. KINGSBURY. Yes. Some days I was putting in a lot of my time.

Mr. OLVER. In general, I can see what the scope of it is and what the numbers might lead to without getting into the details. But it does seem to me, a rather large effort to discover that all of the Title 5, and all of the Title 3 actions are in fact legal, and the only items that are perhaps questionable and still in process are a total of 25 transitional employees—kinds of things on the edges, which may be a few days or a couple of weeks at most, I take it, involved in the transitions. Already, some of the money had been paid back, and the only question is 9,600, which is now clearly in the process of being dealt with. It would be a lot easier, I must say, if one had records similar to what the Congress produces in this instance.

Ms. KINGSBURY. Yes.

Mr. OLVER. Thank you very much.

Mr. HOYER. We have now been through one round of questioning.

The Chair's intent is to adjourn this hearing by 12:30. As a matter of fact, I would like to adjourn by 12:15. Therefore, we will make the second round of questions two minutes apiece in case anybody has any follow-up questions.

Mr. Lightfoot.

WHITE HOUSE PAYROLL CONTRACTOR

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

You brought a point up a minute ago that I would like to pursue just a second on payroll records. DESC, the military agency that has been contracted to handle payroll, would they have in their files payroll records of this administration, and past administrations?

Ms. KINGSBURY. They certainly have the payroll records of this administration. I don't know, because we did not have to inquire for the purposes of this job, what their records retention policy would be. But routinely those kinds of things are archived after a few years, or destroyed, so it is not clear to me what the answer to that question is, but we could certainly ask.

Mr. LIGHTFOOT. Were you given access to DESC in pursuing this investigation?

Ms. KINGSBURY. We had some meetings with DESC officials. In the end we did not get access to that information directly at DESC. We were given access to direct downloaded files from the DESC files through a remote terminal at the White House, and we made the determination that that was adequate for our purposes, so we didn't pursue further access.

Mr. LIGHTFOOT. So you in essence had to make some of your judgments based on White House furnished material, rather than getting into some of the actual payroll records?

Ms. KINGSBURY. Well, we satisfied ourselves that it was a direct download, that it hadn't been edited. We had a computer programmer who went over and sat with the White House person while they were doing it, so that we were able to satisfy ourselves under the standards that we had gotten all of the information for that particular period. So I don't have any reservations that I was somehow being given something that I couldn't rely on.

Mr. LIGHTFOOT. Mr. Chairman, you would have absolutely no reason to know this, and this is through the work of our crack appropriations staff, but during the 95th Congress, Public Law 95–570 says, "The conferees recognize the House requirement for reporting names, general title, job description, salary of every individual employed in the White House is contrary to government-wide rules. Developed to conform with both the Freedom of Information Act and Privacy Act, they are tailored to provide the protection of the privacy of the individuals involved."

NAMES AND PAY OF WHITE HOUSE EMPLOYEES

I think, Ms. Kingsbury will verify, when we asked for this, we didn't want anybody's names. We wanted them coded, because we didn't care who the people were.

Ms. KINGSBURY. That is right.

Mr. LIGHTFOOT. In addition, "the conferees received assurance from the administration that, as in the past, this information will be provided to Congress upon request." So apparently that is in law, and it has been done by apparently both Democrat and Republican administrations in the past, at least since Mr. Carter's day. This was in the 95th Congress. Ms. Schroeder is the only remaining Member of the House that signed this; the rest of us were gone.

Mr. HOYER. Who was it?

Mr. LIGHTFOOT. Pat Schroeder. Ed Derwinski, Mo Udall and Robert Nix were the other managers on the House side.

Again, I appreciate, Ms. Kingsbury, the work you have done. You tried to cooperate with us and do the best you could with what you had to work with, and it is much appreciated. As I said at the outset, this whole thing was instituted in the first place by Federal employees who were very uncomfortable with what they were being asked to do. And I think that—I have no problem with your conclusions that nothing was done illegally as far as the backdating is concerned.

But, as you said, there was sloppy or in some cases absolutely no bookkeeping whatsoever, and the President promised he was going to bring a higher moral standard to government and so on, and now we have a quarter-of-a-million Federal employees that are being cut back and several of them have expressed their opinions to us that they are not real happy that there were backdated pay raises given to people at the White House, and they wanted to find out who the folks were and how much they got.

So, again, I suspect that many of the people within the bureaucracy will probably continue to pursue this. But thank you very much.

Thank you, Mr. Chairman.

FULL ACCESS TO NECESSARY PAYROLL INFORMATION

Mr. HOYER. Let me just clarify now. The figures you gave me were specifically computed from making specific analyses of what people got and when they got it.

Ms. KINGSBURY. Yes, sir.

Mr. HOYER. Or else you wouldn't have given us those figures; am I correct?

Ms. KINGSBURY. That is correct.

Mr. HOYER. So in fact, as I understand it, they did compute the dollars from the actions, the personnel actions, that were taken specifically.

Ms. KINGSBURY. Yes.

Mr. HOYER. Mr. Visclosky.

Mr. VISCLOSKY. You received all the information you needed for the analysis requested by this committee from the White House?

Ms. KINGSBURY. Yes, sir.

Mr. VISCLOSKY. The issue that has at length been discussed this morning is the format?

Ms. KINGSBURY. Yes, sure. I would agree. You mean one issue that has been discussed is whether it would come in electronic form or not. That is right.

ACCESS TO DOD COMPUTER DATA

Mr. VISCLOSKY. Is this unique? You mentioned the Department of Defense. Has the GAO encountered this circumstance before in the executive branch in programs under the Department of Defense?

Ms. KINGSBURY. In mentioning the Department of Defense, I was talking about classified information, referring to some of the difficulties that we have in access to classified information; my experi-

ence in particular with special access information. But we have always been able to ultimately sort those things out, as we ultimately sorted it out here. We just did it by hand instead of in a more efficient way.

Mr. VISCLOSKY. Programs like SDI, programs like the B–2?

Ms. KINGSBURY. Yes, right.

Mr. VISCLOSKY. But you received the information, it was a question of the format of the information.

Ms. KINGSBURY. Yes, sir. And access to it on a day-to-day basis. In those kind of situations, that access is kept under the Department of Defense's control, and we have worked within that, as we have worked within it in this job working on White House issues, and continue to do so in other jobs going on at the White House.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. HOYER. Mr. Wolf?

Mr. WOLF. Thank you, Mr. Chairman. Would you say that much of the paperwork was produced retroactively?

Ms. KINGSBURY. Much of the paperwork; yes, sir.

Mr. WOLF. So there is a major, major difference.

Secondly, would the same individual, Mr. Watkins, have been involved in this, in the Travelgate situation?

Ms. KINGSBURY. Yes, sir.

Mr. WOLF. I have no further questions.

Mr. HOYER. Mr. Olver.

Mr. OLVER. No further questions.

Mr. HOYER. Mr. Istook.

Mr. ISTOOK. Let me just follow up on what you were saying to Mr. Visclosky. The classified information that you are speaking about with the Department of Defense, is that government payroll information?

Ms. KINGSBURY. No, sir.

Mr. ISTOOK. What is it that you are talking about that the Department of Defense does not provide on computer?

Ms. KINGSBURY. Let me make it very clear. If we were doing this kind of job in the Department of Defense, we would have had no trouble getting this information on computer. The parallel came to mind with respect to the working arrangements as a similar parallel. It is not similar information. I would absolutely agree with you about that.

Mr. ISTOOK. The White House is government payroll; the Department of Defense is classified data; you are not talking about payroll there.

Ms. KINGSBURY. That is correct.

Mr. ISTOOK. All right. Thank you.

Ms. KINGSBURY. I am sorry if I introduced that confusion.

Mr. ISTOOK. I just wanted to make sure it was clear. I don't think you were trying to confuse anyone. Thank you.

Mr. HOYER. To your knowledge, were any computer tapes in the Department of Defense ordered by the court to be turned over to outside authorities? Are you aware of the fact that downloading of the Bush White House tapes were ordered constrained by the court?

Ms. KINGSBURY. Oh, in the general concern about the White House computers.

Mr. HOYER. In the transition, there was a problem with the computers, was there not, because of that court order?

Ms. KINGSBURY. My only familiarity with that is the newspapers.

CLOSING REMARKS OF CHAIRMAN HOYER

Mr. HOYER. I have no further questions.

I want to say in thanking you, Ms. Kingsbury, Mr. Hinchman and Mr. Volpe, that GAO continues to be respected for its independent analysis. Your agency is responsive to questions raised by members of both parties and others on questions of public concern. The reason we are having a hearing, is that this is, in my opinion, an issue of public concern.

I was pleased of course to see, as you might imagine, at the conclusion reached that there was no illegality here and that you had the opportunity to base that decision on all of the information you thought necessary to conclude the answers to the questions asked of you.

So thank you very much.

Mr. WOLF. Would the Chairman yield?

I would hope, and I am not going to ask the Chairman, but I would hope we would have a similar hearing on the Travelgate situation when it is over, so that you can come up and see and tell this committee if all the cooperation and if the answers have been given the same way.

Ms. KINGSBURY. I will look forward to that.

Mr. HOYER. I was also pleased at your strong answer to my question on pressure from the White House. Implications have been raised about it and you stated that it was your belief and conclusion that there was no undue pressure placed upon you or your agency with respect to this investigation. That is correct?

Ms. KINGSBURY. That is correct; yes, sir.

Mr. HOYER. Thank you very much, Ms. Kingsbury. We appreciate very much your being with us.

[Questions for the record and the answers thereto follow:]

Total Amount Questioned by GAO

Rep. Hoyer: Your report states that of the 611 new personnel appointments made between January 20 and April 24, 230 (38 percent) were retroactive. What was the total retroactive salary payment for these 230 ?

Response: Retroactive salary payments for these 230 individuals totaled $335,787.

Rep. Hoyer: Of the 230 retroactive payments, what percent were effective for more than one pay period?

Response: Forty-five of the 230 appointments (19.5 percent) were retroactive for 2 or more pay periods. Of the $335,787 retroactive salary payments, 38.5 percent ($129,421) were for appointments that were retroactive for 2 or more pay periods.

Rep. Hoyer: Your report states that 56 employees received salary increases and 11 received salary decreases.

Are these 67 employees included in the 230 we just discussed?

Response: Of the 67 employees who received retroactive salary adjustments, 23 had retroactive appointments.

Rep. Hoyer: What is the total net amount of the salary adjustments for these 67 employees?

Response: Salary increases totaled $502,106 and salary decreases totaled $159,400. The total net amount of the salary adjustments for these employees was $342,706.

Dual Pay

Rep. Hoyer: Your report states that 25 employees were paid by both the General Services Administration (GSA) presidential transition account and the Executive Office of the President.

Are these 25 employees included in the 230 we have discussed?

Response: Of the 25 employees who were paid by both accounts, 15 had retroactive appointments and were included with the 230 with such appointments.

Rep. Hoyer: What is the total amount of the dual payments for these 25 individuals?

Response: Estimated gross payments made from the GSA presidential transition account to these 25 individuals was $18,860. As discussed in our report, 10 of these individuals had already made repayments to GSA. Of the total amount, we estimated that $9,676 in gross payments was owed to GSA at the time our report was issued.

Total Amount of Payments Discussed

Rep. Hoyer: Adding these together, what is the total amount in question?

Response: The total amount that we discussed in our September 1993 report on retroactive appointments and pay adjustments in the Executive Office of the President (EOP) is shown below:

	Number of individuals	Amount
Retroactive appointment payments	230	$335,787
Retroactive portion of salary increases	56	16,116
Retroactive portion of salary decreases	11	6,724
Dual pay from GSA's Presidential transition account and EOP	25	18,860[a]
Total		$377,487

Note a: At the time we issued our report, an estimated $9,676 in gross payments was owed to GSA.

Pressure from the White House

Rep. Hoyer: There has been some concern that the GAO was pressured by the White House to change its views on the title 3 legal authority to make retroactive pay increases. Do you believe you were so pressured?

Response: We held discussions with White House officials, as well as extensive discussions internally, but GAO was not pressured in reaching its views on these retroactive pay increases.

GAO Report Process

Rep. Hoyer: Please provide an explanation of the process GAO goes through in issuing its reports after the data is collected. What is involved with issuing "discussion draft" and "final draft" reports?

Response: After completing our data collection and before our reports are issued, GAO's policy requires that we hold an exit conference with agency officials at levels sufficiently high in the organization being reviewed to promote assurance on the correctness of information covered in GAO products. Obtaining the views of agency officials helps GAO to meet government auditing standards that require these views to be sought. To help ensure that exit conferences meet GAO objectives, GAO frequently provides agency officials with written information that describes the results of GAO's work. For this review, the "discussion draft" served this purpose.

When the issues involved are very sensitive or controversial, GAO's policy is to obtain written comments on its draft reports. For this review, we believed the circumstances warranted sending a "final draft" to the White House for written comments.

Reasons for Retroactive Pay Increases

Rep. Hoyer: What do you believe was the cause of these mixed up personnel practices--do you believe it was a lack of knowledge, a misunderstanding of federal personnel practices, or a purposeful act?

Response: In general, we believe that the retroactive appointments and pay adjustments can be attributed to unfamiliarity on the part of appointing officials about good personnel management practices and lack of attention in completing the necessary paperwork for these personnel transactions in a timely fashion.

INTRODUCTION

Mr. HOYER. Again, this morning we welcome Patsy Thomasson, who is the Special Assistant to the President and Director of Office of Administration. Ms. Thomasson is here to respond to our questions concerning a September 1993 General Accounting Office report entitled "Retroactive Employments and Pay Adjustments in the Executive Office of the President".

The bottom line, as I perceive this report, is that no laws were broken by the White House staff during the very busy hiring period at the beginning of this administration. In my mind, that is the response to the major question.

Nevertheless, I believe that oversight hearings of this type are appropriate, and while I know this is an extremely busy time, I believe this important.

According to GAO, Title 3 of the U.S. Code does provide authority for the President to set salaries for certain employees and with this authority may grant retroactive payment adjustments. We have just heard that that is considered totally legal.

Should Congress accept the advice of GAO to revise Title 3, an action that I am not at all sure would be appropriate, it should be taken up by the Post Office and Civil Service Committee.

Before recognizing Ms. Thomasson, I would recognize Mr. Lightfoot if he wants to make any opening comments.

Mr. LIGHTFOOT. Ms. Thomasson, welcome, thanks for coming down, and we will go with that.

How is that for a statement?

Mr. HOYER. That is good.

Ms. Thomasson, we will recognize you at this time for any statement that you would like to make.

STATEMENT OF PATSY L. THOMASSON

Ms. THOMASSON. I have a very brief statement, Mr. Chairman. Let me begin today by introducing to you John Cressman on my right who is the Assistant Director for the Office of Administration with the Executive Office of the President. He joined my staff—our staff in July of this year. He came to us from the Prudential Insurance Company in Princeton, New Jersey. We are very proud to have him. He was with the Audit Department there. He has added a new perspective and is very well respected in his area of expertise, and I am glad he is sitting on my right hand, because I can tell you that he is my right hand every day.

I come before you today to address the results of the recent GAO audit on the personnel practices of the Executive Office of the President. It is always good to have an opportunity to have a dialogue with this distinguished committee and to explain the strides this administration has taken.

Let me begin by emphasizing that the report concludes that the personnel actions taken by the White House were proper. Moreover, the GAO found that any practices it previously questioned had virtually ceased at the end of the first days of this administration. The report shows that these practices were extremely unusual and represented only a very small fraction of the enormous number of personnel actions taken during that first period of the adminis-

tration. For example, the report shows that only eight percent of appointments during that period came more than one pay period late.

The White House and the Office of the Administration have addressed these areas of concern and have instituted controls to ensure efficient and effective personnel practices. The White House, in cooperation with the Office of Administration's Personnel Management Division, more widely publicized the personnel procedures, issued a new personnel manual written in plain English for the White House Office, and established biweekly meetings with administrative contacts from around the White House to address any personnel or other questions that they may have. In this way, we believe we have brought more understanding and conformity to the new staff about basic personnel procedures and other procedures necessary within the government.

As regards the individuals who received some overlapping compensation from the Executive Office of the President and the transition, in the first few weeks of the new administration, some staff were paid for their White House work while inadvertently being left on the transition payroll for short periods of time. The White House never approved such overlap, and considered it unacceptable then as we consider it unacceptable now.

When we discovered any instances of this overlapping compensation, we took appropriate action to facilitate the repayment of the funds. According to the General Services Administration calculations, the amount actually owing at this time, the time of the report, was actually about $6400. The GSA is currently engaged in collecting those funds and we at the White House as well as the transition are fully cooperating with the GSA in these efforts.

In its report, the GAO expressed a concern for potential abuse in the broad Title III authority, but made clear to us and it is clear in the report that no actual "abuse" occurred in the White House or the Executive Office of the President.

As to the Public Financial Disclosure Report issue, I am proud that—as the GAO report makes very clear—all staff required to file a disclosure report did so. The only issue was that two individuals were required to pay late filing fees. This was less than two percent of the total, which I feel is more than reasonable when we had so many new faces joining government and when we were in the threws of the transition.

I am here to answer your questions with regard to the GAO report and I will be as responsive as I possibly can.

[The written statement of Patsy Thomasson follows:]

OPENING STATEMENT OF PATSY THOMASSON
SPECIAL ASSISTANT TO THE PRESIDENT
AND DIRECTOR OF THE OFFICE OF ADMINISTRATION

Good morning Gentlemen, I come before you to address the results of the recent General Accounting Office audit on the Personnel Practices of the Executive Office of the President. It is always good to have an opportunity to have a dialogue with this distinguished Committee, and to explain the strides taken by this Administration.

Before I get started, I would like to introduce John Cressman, Assistant Director in the Office of Administration, who joined us in July.

Let me begin by emphasizing that the Report concludes that the personnel actions taken by the White House were proper. Moreover, the GAO found that any practices it questioned had virtually ceased at the end of the first days of this Administration. The Report shows that these practices were extremely unusual and represented only a fraction of the enormous number of personnel actions taken in that period. For instance, the Report shows that only 8% of appointments during that period came more than one pay period late.

The White House and the Office of Administration have addressed the areas of concern and have instituted controls to ensure efficient and effective personnel practices. The White House has, in cooperation with the Office of Administration's Personnel Management Division, more widely publicized the personnel procedures, issued a new personnel manual for White House Offices, and established bi-weekly meetings with administrative contacts from around the White House to address any personnel or other questions they may have. In this way, we have brought more understanding and conformity to this new staff about basic personnel procedures.

As regards the individuals who received some overlapping compensation from the EOP and the Transition, in the first few weeks of the new administration, some staff were paid for their White House work while inadvertently being left on the Transition payroll for a short period of time. The White House never approved such overlap, and considered it unacceptable then and now. When we discovered any instances of this overlapping compensation, we took appropriate action to facilitate repayment. According to GSA calculations, the amount actually owing at the time of this report was approximately $6,400. The GSA is currently engaged in collecting those funds and we are fully cooperating with the GSA in their efforts.

In the Report, the GAO expressed a concern for potential abuse of the broad Title 3 authority, but they made clear to us, and it is clear in the Report, that no actual "abuse" occurred in this White House or the Executive Office of the President.

As to the Public Financial Disclosure Report issue, I am proud to say that -- as the GAO Report makes very clear -- all staff required to file a disclosure report did so. The only issue was that two individuals were required to pay late filing fees. This was less than two percent, which I feel is more than reasonable when we had so many new faces joining government and when we were in the throws of a transition.

I am here to answer your questions with regard to the GAO Report, and will be as responsive as I possibly can.

INTERNAL CONTROLS FOR PERSONNEL ACTIONS

Mr. HOYER. Thank you very much, Ms. Thomasson.

Ms. Thomasson, the GAO report states that retroactive payments were a frequent occurrence during the new administration. Although as you point out, they were the minority of personnel actions, not the majority. What management controls have been put into place to ensure that there are not frequent retroactive payments in the future?

Ms. THOMASSON. I must say I miss Mr. Rasmussen. I saw him recently and he is doing very well, and he tells me that his blood pressure is down about 15 points.

Mr. VISCLOSKY. What is he doing now?

Ms. THOMASSON. He is just being retired for the time being and he just looks wonderful fishing and playing golf and being a house-husband. He tells me he is fixing dinner for his wife every night. That is a pretty good job right now. I talk to him on a regular basis because he is a world of information and a great resource person for us. He helps me a lot.

Mr. HOYER. For the record, Ms. Thomasson, because Mr. Rasmussen has testified here before, and in fact has responded to questions regarding this investigation, as I recall, when we had the budget hearings, Mr. Rasmussen was a long-time employee of the White House personnel or Accounting Office, am I correct?

Ms. THOMASSON. He was a long-time employee of the Financial Management Division of the Office of Administration. He had been in the government for a long time and had great historical knowledge of the Executive Office of the President, and the White House, because his first job at the White House was as a military liaison.

Mr. HOYER. I just wanted to clarify. Those of us who have met Mr. Rasmussen know that.

Ms. THOMASSON. I think, sir, that we have, in fact, instituted procedures that should prevent these kinds of events from happening in the future. First of all, we instituted and rewrote the White House Personnel Manual into what I would describe as plain English, in terms that are very easy to understand.

It is double-spaced, it is in big type, it is easy to follow; we gave them a checklist to follow so that it is easy for each administrative person in each office. Even if there is to be a change of administrative contact within a department at the White House, it is easy to hand them the new manual and say: "Okay, here is what you follow. This is exactly what you do on each new employee."

In addition, we have reassigned an additional person within the Office of Administration to the personnel management team responsible for the White House, the Office of the Vice President, and the Office of Policy and Development (they are all offices governed by Title III) to work with those particular agencies to make sure that everything is processed in a quick and efficient manner. Those things have happened.

In addition to that, I think the most important thing is that we meet on a biweekly basis and we discuss problems that may occur. When I say "problems", I do not mean only personnel, by any stretch. It could be anything going on at the White House: how do we get people in and out more efficiently, how do we get people on

the payroll more efficiently, anything. But we meet on a regular basis to discuss these items. So I think we have taken the necessary steps to make this more efficient.

AUTOMATED PERSONNEL MANAGEMENT SYSTEMS

Mr. HOYER. Now, you might want to have your new auditor comment on this, but I presume that you are now utilizing computer capability to handle personnel actions; am I correct on that?

Ms. THOMASSON. Yes, sir, we have always used computer capabilities to handle all personnel actions in the White House. Before the Clinton administration came to the White House, sometime in January, and I don't know specifically the date, but sometime in early January, the previous administration took all the timekeeping certification responsibilities away from the different departments in the White House. Because as we were coming in, there were a lot of those people that were leaving. So the people who have knowledge of how to do the certifications within the computer were decreasing each day.

So when we came in, we had zero knowledge of how to certify within the timekeeping process in the computer. So that timekeeping was done within one centralized office. We have now decentralized the timekeeping responsibility, so that each department within the White House has its own timekeeper, timekeeping for each individual. Timekeeping is still done by the exception method, as is the Title V timekeeping at the Executive Office of the President.

That means that everyone is certified for 80 hours unless a form has been submitted by them or by their department head that says they didn't work 80 hours this week, or this pay period. If they had four hours of sick leave, that is an exception, so those four hours of sick leave get entered into the computer. So yes, all of it has been computerized in the past and will continue to operate by the computer.

OVERLAPPING PAYMENTS

Mr. HOYER. I want to go back to the question of the dollars. Nine employees were overpaid by four days. What is the total amount associated with these overpayments and what is the status? Is this the $6,000 you referred to?

Ms. THOMASSON. No, sir, it is not. The $6,400 I referred to is the amount owing by those individuals who received overlapping compensation from the EOP and the transition.

Mr. HOYER. So that in effect, it is a third less or say a third more that has been paid that GAO knew about?

Ms. THOMASSON. It might be a little bit misleading, sir, to say that a third less was paid, or a third more was paid, because I think the problem is the number was misstated to begin with. The number that was stated in the GAO report was a gross number; by "gross," I mean before taxes, social security, and other things had been taken out of that person's check. For example, if a person's gross pay was $1,000, their net pay might have been $600. So the amount the employee has to pay directly back to GSA would be the $600. The $400 would be retrieved from the appropriate source, such as the Social Security Administration.

Mr. HOYER. Ms. Kingsbury said that other sources would be looked to for compensation, presumably the IRS and the social security, et cetera.

Ms. THOMASSON. Right.

Mr. HOYER. So that the $9,000 and $6,000 difference, it may or may not be accurate. You may agree on the fact that there is from these employees the $6,000, but the additional dollars are the $9,000 figure, is what you are saying?

Ms. THOMASSON. Yes, sir.

Mr. HOYER. So there is about $6,000 due and owing from the remaining employees?

Ms. THOMASSON. Right, exactly.

Mr. HOYER. And what action are you taking with GSA, if any, to ensure that is paid?

Ms. THOMASSON. We are working with the General Services Administration and the transition team to locate these 25 employees and to make sure that the General Services Administration has full address information and data on them to assist them in collecting this money. If any of those people who still owe money to the General Services Administration transition are working at the White House, then we will urge them to repay the money as quickly as they can.

If they are working at other agencies and we know where to find them now, then we will also give any of that information to the General Services Administration.

GAO ACCESS TO INFORMATION

Mr. HOYER. In terms of the availability of information to GAO, you heard the discussion here, and I'm sure there was some discussion about prior to the report being issued about access to data. Do you believe that you have established procedures to ensure that GAO had access to all necessary documents?

Ms. THOMASSON. Yes, sir. It is very difficult for me to understand what their total objections are. Before we started the process of the audit, I met with people within the Office of the Administration who had been through GAO audits in the past.

I said, you know, this is a new animal to me; I don't know how to approach this. It is different from anything I have ever experienced; tell me what your experience is, give me your advice and counsel on how you think we should handle it.

The first recommendation was that we ask the GAO to provide all their requests for information in writing to us, so that we would know that it was in fact an official request. We put this procedure in place. We provided them with all of the information they needed, as Ms. Kingsbury said, to do their audit.

She is also very correct in saying that we did not allow them to have downloaded information on computer disk, because we were concerned about the security of the information and whether or not it would be leaked into the public domain. We did have that concern, but she did have full access to any information she needed to do her report.

EARLY RELEASE OF REPORT

Mr. HOYER. Okay. Now, in terms of leaking, it appears that a copy of the GAO report was released prior to its public release, as you know. Did the White House provide a copy, to your knowledge, of either the discussion draft or the final draft report to anyone outside the White House staff?

Ms. THOMASSON. No, sir.

Mr. HOYER. Mr. Lightfoot?

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

Ms. Thomasson, welcome. To paraphrase an old line from the IRS, the Appropriations Committee is here to help you. We just want you to do a good job and we want to help in that process.

In regards to——

Mr. HOYER. I am sure, although not articulated, her response is the same as the public's.

Ms. THOMASSON. I appreciate Mr. Lightfoot's help on the appropriation bill.

PAYROLL AND PERSONNEL PROCESSING

Mr. LIGHTFOOT. I, too, don't believe in censorship, but there are some things that should be left unsaid.

In regards to your opening statement, you pointed out correctly that the retroactive appointments comprised 8 percent of the total number of appointments that you had down there, but it also represents those over one period that were stated retroactively up to one, that is nine periods; back, it is about 20 percent of that figure that were over the one period.

GAO told us that it takes one or two days to process the paperwork. Why were you having problems, I guess it is just the plain basic question? GAO thinks you can do it in a couple of days. You know, why were you folks running into all kinds of difficulties?

Ms. THOMASSON. The bottom line, Mr. Lightfoot, is that the reason that we had so many difficulties is that we had so many to do. For example, the one person that you referred to as nine payroll periods out for his appointment, that employee was an uncompensated employee. He was a special government employee who does get an appointment.

He didn't have any compensation; because he was an uncompensated employee and because there wasn't any money that needed to change hands, every week as the Office of Administration Personnel Division staff received their work, their input into the computer, this employee gradually slipped to the bottom of the stack every time, because it was not really as important to that person whether or not they were in the system or not, because they were uncompensated.

The real reason that we had so many problems is that there were so many pieces of paper to process, so many different employees to process from so many different divisions. When you are talking about other agencies in the EOP, the turnover in those agencies was very small, maybe five, six employees per agency. But the White House office completely turned over, or almost completely turned over. There might have been—there is a small percentage

of employees that were employees who had been there before who continue to work for us now.

Mr. LIGHTFOOT. 444 out of the 611 were at the White House, which, you know, verifies what you just said, that there was a large number there.

You mentioned in response to Mr. Hoyer's questions that you have basically written a new manual and so on. Why did you think that was necessary to do that?

NEW PERSONNEL MANUAL

Ms. THOMASSON. Because the old manual was not clear. When we met with the administrative contacts, they would say, well, what does this really mean, how should we approach this, what is this document we should use, what form is it that we should use. Because of that confusion, with the assistance of the Personnel Management Division of the Office of the Administration, we had a group, a working group that sat down and said okay, let's make this easier to read, easier to follow, so that there aren't these questions, and so that everybody has a better understanding of what needs to happen.

Mr. LIGHTFOOT. Well, I ask it in a context of, as I mentioned earlier, the reason that we asked for this investigation in the first place was because of the heartburn that a lot of Federal employees were having with what you folks were asking them to do. They have handled transitions between Republicans, from Republican administrations, from Democrat to Republican, Republican to Democrat over the years, and apparently had never experienced these kinds of problems.

Now, is this part of reinventing government? It seems to me that you had some people there, many of them with 25, 30 years experience, who viewed their office, or their responsibilities of serving the Office of the President, not the individual, so it was a nonpartisan-type thing, and most of those folks I have found have been very dedicated people and they are very knowledgeable in how to make things work. Was there an intent on your behalf in coming in that you wanted to do it a different way?

Ms. THOMASSON. No, sir, I don't think that we are doing it a different way even today. We asked the Office of Personnel Management at the Office of Administration to work with us on developing procedures that would be very easy to follow.

The career employees are the ones who helped us and worked with us directly to draft the new procedures and to draft procedures that would be effective within the Office of Administration. We used the career employees extensively in that process.

RETROACTIVE PERSONNEL ACTIONS

Mr. LIGHTFOOT. In the GAO report, there was a memo that was issued under Mr. Watkins' name some time in late January, which according to the GAO stated, "there is no backdating in the Federal Government." End of quote. Do you ever recall seeing that memo?

Ms. THOMASSON. Yes, sir, I have seen the memo.

Mr. LIGHTFOOT. Who directly authorized the backpay?

Ms. THOMASSON. When there was a situation that would come to the attention of the Office of Management and Administration

where an employee had, in fact, been working at the White House, who had been doing work on a daily basis at the White House, and who had not received a payroll check for that work period, it was determined that they were in fact de facto employees of the White House and they deserved to be paid.

It would have been very unfair and inequitable to that employee to have them working there and not pay them, if there had been in fact an agreement to pay them. So decisions were then made and assurances were received that these people had been there, had been working, that they should in fact be paid and that is when the actions were taken and the employee was paid.

Mr. LIGHTFOOT. Did Mr. Watkins make that decision?

Ms. THOMASSON. The decision would be made in the Office of Management and Administration. It might have been made by an appointee of Mr. Watkins as opposed to him making each individual decision.

Mr. LIGHTFOOT. Did anybody in your shop advise you against doing backdating? Any of your legal people or whatever?

Ms. THOMASSON. Our legal people did not, to my knowledge, Mr. Lightfoot, advise us against that. I think because of the explanation provided to the General Accounting Office in the report, it is perfectly acceptable under Title III. If someone has been working to appoint them and to pay them. These people had been there, they had been working at the White House on a daily basis, and in many instances in those early days from very early in the morning until very late at night. We made sure and we always knew that an employee was there and had been working before they were approved for any salary payments.

Mr. LIGHTFOOT. Do you—and I guess this is maybe an unfair question because it is supposition, but do you know what made Mr. Watkins change his mind, that he went ahead and authorized payroll backdating, when he put out a specific memo saying don't do it?

Ms. THOMASSON. Mr. Lightfoot, it would be a great asset to be able to read someone's mind from time to time.

Mr. LIGHTFOOT. I wish Mr. Watkins was here, quite frankly. And I understand that he was invited to the hearing today and I believe the Chairman even offered a personal invitation, if I am not incorrect.

Ms. THOMASSON. I don't know of the conversations that Mr. Watkins might have had with Mr. Hoyer or didn't have with Mr. Hoyer. I do know that Mr. Watkins was interested in being fair to the employees of the White House, and if they had been there and in fact working, he felt compelled to pay them for the work done, even if their administrative head had not done the paperwork appropriately.

Mr. LIGHTFOOT. There is a Comptroller General ruling on backdating which basically said that backdating the payroll actions is not allowable for Title V employees. Were you or anyone on your staff aware of that particular ruling?

Ms. THOMASSON. I am not——

Mr. LIGHTFOOT. In the time period we are talking about. I know you are now.

Ms. THOMASSON. I don't know that I was aware of that during that period of time. The employees that we are talking about that we were working with and were subject to the GAO were Title III employees, not Title V employees.

Mr. LIGHTFOOT. Would you know if Clarissa Cerda, who I understand is an attorney and did sign these authorizations for the backdating, was she aware of this Comptroller General ruling? Did she have access to the memo that Mr. Watkins had written in January which said that there is no backdating in the Federal Government?

Ms. THOMASSON. I would have no knowledge about whether Ms. Cerda had knowledge—had information regarding the GAO Title V Comptroller General opinion. I just don't have a way to know that. I am sure that Ms. Cerda was aware of Mr. Watkins's memo.

SPECIFIC PERSONNEL ACTIONS

Mr. LIGHTFOOT. One of the things that, because of the high profile, the individual has received a lot of attention, whether it is correct or incorrect, maybe we can clear the water a little, is the appointment of Mr. Rubin. According to the GAO, his effective date for payroll purposes was originally January 20th. Then it was changed to the first week in March, then it was changed back to March 1st.

Obviously the question is why, but particularly when you folks knew he was going to come on line, I believe he was appointed somewhere around December of the previous year. He would have been one of your first people, I think, and to go on payroll January 20th when you started off. Here is a fellow who made, according to some sources, 20 million dollars last year, getting retroactive pay because of the switching around of his starting date.

Can you clarify why his starting date was shifted from January 20th into March and then back to March 1st?

Ms. THOMASSON. Mr. Rubin's responsibility is head of the National Economic Council at the White House. During the first six weeks—not six weeks, between January 20th and February 9th, there was a lot of budgeting of dollars and people. First of all, we budgeted numbers of people that each department could have. Subsequent to that, each department was budgeted the total dollars they had to spend. Mr. Rubin was reticent to pay himself or put himself on the payroll as many other department heads were reticent to spend money until they knew exactly what they had. Mr. Rubin was sensitive to it more than others might have been because of his prior earnings and his prior life.

It was always intended that Mr. Rubin would go on the payroll as of March the 1st. I have no knowledge that there was any date other than March 1st, and he was put on the payroll March 1st, and he did file his financial disclosure form on February 19th, well within the time frame of the first month that they came to work at the White House.

Mr. LIGHTFOOT. So then the back-dating on Mr. Rubin was intentional, then?

Ms. THOMASSON. To March the 1st, we had agreed that would be Mr. Rubin's start date.

Mr. LIGHTFOOT. There was a memo we understand in Mr. Rubin's file advising him specifically not to back date his records. Are you aware of that?

Ms. THOMASSON. I am not sure of the memo you are talking about, Mr. Lightfoot.

PERSONNEL MANAGEMENT WORKLOAD

Mr. LIGHTFOOT. It was just a recommendation from people within the White House that his records should not be backdated, and probably because of the high profile. I understand why they would do that.

The GAO report said, and this is a quote out of the report, "The overload of existing processes and procedures contributed to the need for retroactive appointments."

I will just give you an opportunity to respond to that. What did that mean to you when you gave that answer?

I guess where I see the confusion in it is, are you saying that the current government regulations are too complex, which most of us probably agree with you, they are, but at the same time we have all had to live with what we have, and this is one of the reasons given to the GAO folks, that the back date had taken place. The overload of existing processes and procedures contributed to the need for retroactive appointments.

Ms. THOMASSON. There were just so many people to get on the payroll at that given period of time, at January the 20th. People came over to the White House and went to work, even though they did not have an appointment and did not have any idea whether they would get a job or not.

There were a handful of people who knew in December or early January that, yes, they were going to have jobs in the White House. The department heads at the White House did not know until February the 9th how many staff they could hire in each one of their departments. Then it was another two weeks after February the 9th before they were given their budget number of the amount of dollars they would have to spend within their department.

This is one of the things that caused the most consternation during the first three weeks to a month of this new administration, on getting people on the payroll on a timely——

Mr. LIGHTFOOT. I guess what I am trying to get to, from people we talked with, I assume, and this was not a scientific study, but we did talk to people who had worked in both Republican and Democratic administrations in the past that this was pretty much the way it happens when a new President comes in or takes over, that you have these kinds of things.

I guess what I am trying to get to is, why was this more of a problem for you folks than it was for Mr. Carter when he took office, for example, or whoever? You can pick anybody you want to pick, from either party. We just haven't had this problem before.

PRESIDENTIAL TRANSITION

Ms. THOMASSON. I don't know that we haven't had this problem before. I haven't spoken with the personnel people or with the office of the administration head from the Carter administration or

the next administrations, Reagan or Bush. I don't know whether these problems have happened in the past.

I would certainly say the transition from Bush to Clinton in 1993 was probably as great a transition as we saw between Truman and Eisenhower in 1952. We had a long stream of Democrats at that period of time and then we switched to having Republicans in the White House. This time we had a very long stint of Republicans and now we have Democrats in the White House.

I think that kind of transition creates more change and more difficult transition events happen. And I think that probably contributes to the problem as much as anything.

Mr. LIGHTFOOT. This is all anecdotal, but we have heard from a number of people from both sides of the political aisle that the cooperation during the Bush-Clinton transition amongst the people in the trenches doing the work was very good. Would you agree with that or not? I don't know. I am just asking.

Ms. THOMASSON. I have no idea, Mr. Lightfoot. I didn't come until March the 1st. So I don't know what happened during that period of time.

Mr. LIGHTFOOT. Thank, Mr. Chairman.

Mr. HOYER. Mr. Olver?

DE FACTO EMPLOYEES

Mr. OLVER. Thank you, Mr. Chairman.

I am sort of curious, was there ever, Ms. Thomasson, a suggestion that people who had actually been there and worked should not be compensated for the work that they had done?

Ms. THOMASSON. Mr. Olver, we didn't contemplate that. If they were there and they were working and the department head had the money to pay them within their budget, we felt they should be paid. It was a very equitable thing to do for those employees, those people who had worked very hard. We certainly couldn't consider not paying them for work being done.

And I think in government phraseology and terminology, they were called de facto employees even though they had not been appointed yet. So yes, we always thought they deserved to be paid.

Mr. OLVER. So it was totally within the legality, as this whole investigation shows, that all of the pay actions in regard to Title 5 and the Title 3 employees are in fact legal according to the GAO audit, and it is a question of the moral obligation of whether people in fact, aside from the legality, whether there is a clear moral obligation, it seems to me to pay people for work that has been performed in this process.

Ms. THOMASSON. Yes. Absolutely.

PAPERWORK REDUCTION

Mr. OLVER. I want to just say, your creation of a document in English, if we would extend that to a few other things, I see more and more documents that I don't know what they are in, or maybe in Latin or in legalese or whatever, but creating documents that people can work with that are in plain English for lay people is extremely valuable. For you to extend that process over the next three years of this administration, of reducing the total amount of paperwork that is involved in this process by half each time, that

would be extremely valuable. You would become a legend in your own time if you would do that.

I think it is certainly one of those things that would be possible for the administration to do. Then we would really be sailing in the out years.

Ms. THOMASSON. I couldn't agree with you more, sir. I had a very interesting class I took a couple of years ago called expository writing that really meant how to explain things. And every exercise in the class was to write for a specific audience, so that when we sat down to do this personnel handbook, we tried to write specifically for those people who would be working with it and handling it each day. I think if we could follow that throughout the government, IRS things that have to be filed, those are so complicated, it would be better if they were in language that the average American could read and understand and know what to do.

Mr. HOYER. This could be a dangerous precedent for legislators. We would have to write legislation in English.

Mr. OLVER. Said like a true lawyer, Mr. Chairman.

Mr. VISCLOSKY. We could create a congressional exemption.

Mr. OLVER. Ms. Thomasson, one other thing I would like to pursue for a moment what is the average pay for the people in the White House, Office of the White House, the EOP?

AVERAGE SALARIES

Ms. THOMASSON. Off the top of my head, Mr. Olver, I cannot tell you specifically what the average is. As I recall the budget process for 1994, we budgeted for one level of employee, with an average of $37,000 or $38,000, and then for those a step above that it is around $58,000. I will get the specific numbers and give them to you.

[The information follows:]

EXECUTIVE OFFICE OF THE PRESIDENT, WHITE HOUSE OFFICE, PERSONNEL SUMMARY

	Fiscal year—		
	1992 actual	1993 estimated	1994 estimated
General Schedule positions (FTE)	99	100	100
Ungraded positions (FTE)	298	308	301
Unfilled positions	4	0	0
Total employment, end of year	398	408	401
DETAIL OF POSITIONS			
Direct:			
Total compensable workyears:			
Full-time equivalent employment	398	408	401
Full-time equivalent of overtime and holiday hours	2	2	2
Average GS grade	9	9	9
Average GS salary	$35,004	$36,788	$36,788
Average salary of ungraded positions	$51,417	$49,765	$49,765

Mr. OLVER. You bracketed a number. Would it be fair to suggest that it might come—you have got 450 or so employees. Would it average out to somewhere around $50,000 plus or minus?

Ms. THOMASSON. Yes. We only have 395 employees now.

OVERLAPPING PAY PERIODS

Mr. OLVER. Fine. So what we are talking about here, since all of the pay actions in the case of the Title 5 and Title 3 employees were in fact legal, and the matter that it seems to me we are contending over, at least in part, is this issue of the transition, the overlapping pay periods of the transition period and of the budget for the White House itself, so that if we are talking in the sum total of about $16- or $18,000, and you have described that a good portion of that is in fact recoverable from some other agencies, and it is now down to, according to the GAO, something under $10,000, and that at least in terms of the responsibility directly of the individual employees is something like $6,400, am I understanding it correctly that the number you described as $6,400 is in fact the portion which is the employee's responsibility of the GAO's number of $9,600 or thereabouts?

Ms. THOMASSON. That is correct.

Mr. OLVER. That represents, by a relatively quick calculation, something around 48 days of time that is involved in this possible overlap and transition, in transition accounts, and the White House account, which for a total of 25 employees is, on average, under two days per employee in overlap arrangements and the different pay periods that are involved.

I guess I am surprised that you have been able to do that that closely, and in fact were making the corrections for a good many of those cases already as they were beginning to show. When did you expect this to be the—the corrections to be complete?

Ms. THOMASSON. I understand from the General Services Administration that they will send out notices to these employees no later than Monday of next week. They have taken the time to make sure that the calculation of each employee's debt with GSA is in fact correct.

Once that notice goes out, I understand that the GSA would expect payment within 30 days. It should certainly be able to get those payments back within a very short period of time.

I think the other thing that should be in the transition handbook for any transition in the future is that the transition payroll dates should coincide with the White House and the Executive Office of the President's payroll dates. If that had happened, it would have been a much easier and simpler transition and we probably would not have had as many overlapping instances as we did. Of course, I suggested that everybody in the government be paid on the same date, but they really laughed at me.

Mr. OLVER. It would help clearly if the transition and the White House payroll periods were the same. It would seem to me to allow for elimination of a good deal of what really it comes down to, which is a rather small total amount of this transition overlap.

Ms. THOMASSON. Yes, sir. It would be very helpful to have the payroll dates be the same. If they had been, I don't think we would have had even 25 instances and $6,400 of money to be paid.

Mr. OLVER. Thank you.

Mr. HOYER. Mr. Wolf?

Mr. WOLF. Thank you, Mr. Chairman.

I am going to make the statement, and then I am going to ask a couple of questions, and I am going to abide by—I have great respect for the Chairman, and if the hearing was limited to that, I have so many other questions. And I am going to send them to you in writing and I am going to ask that they be answered. But I respect the Chairman and I will try not to violate that as I ask some questions. But my conscience would not be clear if I didn't make it clear on some of the issues that I am concerned about.

This morning I had hoped to look at series issues of what I believe potentially could be mismanagement at the White House. Unfortunately, the back-dating of paychecks is only one area where the management of the White House has been inadequate.

Last May, when the White House travel office employees—one them is a constituent of mine, and I don't know if he is a Republican or Democrat but I sense a number of people who have been fired or put off somewhere were Democrats as well as Republicans. And since I have been here, I have worked hard with regard to Federal employee issues. A current White House employee, in a memo to the Chief of Staff, cited abysmal management in the office as the reason for the firings. That ruins their reputations because they will carry that with them for the rest of their lives.

I think it is unfortunate that Mr. Watkins, later reprimanded by the White House, has refused to be here today. His actions began what has become a costly burden to the employees and the American taxpayers, and he should have been here—costly for those seven individuals who will never be able to erase this, it will go down in history, their kids and grand-kids will always be able to go to libraries and look it up to see how they were defamed, publicly, on television and in every other way, they will always be able to see it.

Today we are looking at the management of the White House. How do they fare? Are their records in order? Have they provided documents in a timely manner? Have they been forthright in presenting the information?

The Office of Management and Budget has been less than candid on some of these issues. Are we down by 25 percent in personnel? Was it all taken out of the Office of Management and Budget, and USTR we moved off, or did we designate the drug czar's office? These are issues that I think are very, very important.

I have additional concerns, and have been trying to get some answers for some time about the situation regarding White House passes. We have Harry Thomasson has had a pass, Harold Ickes. The reports said when he came up to the Hill people didn't know whether he was representing Puerto Rico or representing the White House.

When I think of all the people who come to Washington and stand in line to come to the White House, the thought of Harold Ickes making $12,000 a month, being retained by Puerto Rico, can get into the White House when someone who has come here an an average citizen can't with a White House pass, I think it is wrong, and I think there is accountability that has to be given.

I will respect the Chairman and if he says it is limited to that, I will take him at his word and I will not ask the other questions at this hearing. But there are a lot of other questions. And it is chilling, it is chilling, and I have talked to Federal employees in my old district and my new district, it is chilling when they can see what can happen, and they are not Congressmen, they don't have campaign funds that they can use to defend themselves, they are not prominent people. They can't have dinners at the Mayflower like other people can to pay for their legal defenses. They can't tap into former contributors. They are without anything. And therefore they are in deep, deep trouble. Almost all five, perhaps all seven, have legal fees of over $30,000 apiece. And to keep them hanging for four months when you have been paying for both offices—and then I saw the article in the paper the other day that the billing there isn't very accurate, and the press is now complaining about the billing. So I will put those in a letter form to you.

You said in your statement, as to the public financial disclosure report issue, "I am proud to say that the GAO makes clear that all staff that are required to file a disclosure report did so."

That is not true. If you look in the Washington Times the other day where they talked about the health task force, only 30 of 125 health care task force members required to file financial disclosure statements did so according to Justice Department lawyers. I mean, so that statement is really not accurate if you look at the one story with regard to your own Justice Department on these people, they did not file the statement.

Do you have any comments with regard to that?

Ms. THOMASSON. Mr. Wolf, I specifically would quote from the GAO audit that said there were 147 disclosure statements that were required. One hundred and thirty-three of those disclosure statements were filed on time. That was 91 percent. There were 12 of the disclosures that were filed late, which the Office of Government Ethics waived the deadline on those 12. There were two people who did not file on time, 1 percent of the total, who paid a fine of $200 because they did file their ethics report late.

Mr. WOLF. I read from the newspaper, the Washington Times, where it said with regard to the health care panel, in one of those filings, the Justice lawyer said only 30 of 125 representatives of special interests involved in creating Mr. Clinton's $1 trillion government-managed health care system filed conflict of interest or financial disclosure forms.

Mr. HOYER. I just want to observe—I understand that newspaper, again, as I understand it, they were not within the ambit of the White House employees. Therefore, the GAO report from which you quoted does not address those individuals.

Mr. WOLF. Mr. Chairman, but there is a pattern. You have got the same thing with the travel office. You have the same thing with the back-dating. You have now the health care, the records with regard to the task force are not available. Even employment personnel forms are not available.

Let me ask you one other question. Why was the paperwork produced retroactively, and the GAO acknowledged that it was, when career White House employees knew how to do the paperwork from

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past practices? They knew how to do it. Why was it done retroactively?

Ms. THOMASSON. People's paperwork did not get in on a timely basis because we didn't know in each department, Mr. Wolf, how many people they would be able to hire, nor how much they would be able to pay them, which necessitated delays in the employment processes.

Mr. WOLF. But I don't think that answers the question. With career people there, and knowing how to do it, why was it necessary to do the back-dating?

Ms. THOMASSON. The career people knew how to put people on the payroll. It was necessary to determine whether or not there was money there to pay the employee. There was not any discussion with the career person about what the budget process was, nor what the FTE budget process was. As soon as the department head knew what he had or she had to use to pay their staff, they made the appointments.

Mr. WOLF. I still don't understand. If you have the career people as you come in, as you come into Congress you have the career disbursing office people and people like that to tell you how to do things. If you had people who knew how to do it, why was it necessary? Why didn't you talk to them?

Ms. THOMASSON. We used our career staff extensively, Mr. Wolf, on a regular basis. They helped us a lot.

Mr. WOLF. But not in this area?

Ms. THOMASSON. In this area too, they did, yes.

Mr. WOLF. Did you ask them?

Ms. THOMASSON. Certainly. We worked with them on a daily basis.

Mr. WOLF. But why was it necessary to do the back-dating when you had the career people there warning you about not back-dating and they knew how to do it?

Ms. THOMASSON. I guess I don't quite understand the question, Mr. Wolf, because if we didn't know whether or not we had the money to pay someone until after they went to work, then even though the career staff would have known specifically how to make the appointment, they couldn't have made the appointment until we had the other knowledge in order to facilitate making the appointment.

Mr. WOLF. I am not sure I understand. Did the career people warn you about the potential problems with regard to back-dating?

Ms. THOMASSON. I don't think the career people thought there was a problem with back-dating, Mr. Wolf.

Mr. WOLF. Well, we have had career people tell us that there was a problem with back-dating.

Ms. THOMASSON. I think the GAO audit specifically says there was not a problem with the back-dating.

Mr. WOLF. I don't think that is exactly what it said. They say it was sloppy. Do you agree that they said it was sloppy?

Mr. HOYER. If the gentleman would yield, on page 18 of the report, it says, "On the basis of that authority," meaning Title 3, "we conclude that retroactive pay increases were proper."

Mr. WOLF. Do you agree it was sloppy?

Ms. THOMASSON. Do I think it was sloppy? I think it was important for staff at the White House to be sure of how much money we had and how many people would get hired before we put people on the payroll. I think it was in fact very important for us to know the answer to those two questions before we put too many people on the payroll and spent more dollars than this committee had appropriated for us.

WHITE HOUSE ORGANIZATION CHART

Mr. WOLF. When you were here last time, you promised us a chart, an organizational chart of the breakdown of who works at the White House. You said you would get that to us.

Ms. THOMASSON. At this point, Mr. Wolf, we do not have an organizational chart at the White House. We do have a new telephone book that has just been printed last week and distributed last week when I was out of town. I brought a copy of that today.

Mr. WOLF. Does that tell who you works for who, under what different offices, so that——

Ms. THOMASSON. Yes, it does.

Mr. WOLF. Can we see a copy of that?

Ms. THOMASSON. I have brought one for you today.

Mr. WOLF. You have promised a chart. When will the chart be available so we can see how many work in different offices so if we can see that the cuts were necessarily made?

Ms. THOMASSON. I do not know when a chart will be available, Mr. Wolf.

Mr. WOLF. Last question. Mr. Lightfoot said in the hearing, Mr. Rassmussen, sir, I don't make a practice to back date at all, meaning they never have done it in the past.

Ms. THOMASSON. That is for financial accounting records, not personnel, that I think he was talking about, Mr. Wolf.

TEMPORARY ACCESS PASSES

Mr. WOLF. Last question, I have heard there has been a lot of temporary passes at the White House. Do you have a temporary pass or a permanent pass?

Ms. THOMASSON. I have a temporary pass, Mr. Wolf.

Mr. WOLF. And you have been working in the White House since March?

Ms. THOMASSON. Everyone has a temporary pass until the vetting process is done on the employee. So no one gets a permanent pass at the White House until you have been completely vetted by the FBI. Sometimes it takes months to completely get someone there. Sometimes it takes a lot of time and energy to do that. You are not issued a permanent White House pass until that procedure is done.

Mr. WOLF. I have a number of questions I could ask about that, but in respect to the promise I made, I won't follow that up.

Thank you, Mr. Chairman.

Mr. HOYER. I thank the gentleman.

Mr. Darden?

TOTAL AMOUNT OF OVERPAYMENTS

Mr. DARDEN. Thank you, Mr. Chairman.

I believe the total amount of money we talked about in overpayment between transition and regular White House employees came to $9,000 something, and according to another figure, $6,400.

Mr. Chairman, I assume we are spending a lot more money than that on this hearing this morning. So I think it is probably time to go on to something else.

Now, you, of course, have been talking this morning about the retroactivity in relation only to Title 3 employees, have you not?

Ms. THOMASSON. That is correct, Mr. Darden.

SIMILAR TRANSITIONS

Mr. DARDEN. Mr. Chairman, I just have a brief statement. Assuming I live until November the 10th, I would have been here 10 years. I came here on a special election, as you did, and I believe Mr. Olver did, under some very unusual circumstances. I can't help but recall my coming here and bringing up my team. I had four resignations in the first week, three firings. I brought another seven people from Georgia. I must have had 15 transactions in the first two days I was here. So I am sympathetic with the problems and confusion and matters that go on.

I frankly fail to see why such a big deal is being made over this. I appreciate the Chairman convening the hearing. I hope we can go on to something more productive very soon.

Mr. HOYER. Mr. Visclosky?

STATUS OF CURRENT OPERATIONS

Mr. VISCLOSKY. The purpose of the hearing, as I understand it, is to review the GAO report relative to back-dating and salary adjustments which occurred between January 20th and April 24th.

To your knowledge, has any problem occurred subsequent to April 24 in terms of back-dating and salary adjustments? Has anybody suggested that there has been a continuing problem after the period of time under study today?

Ms. THOMASSON. I don't know that anyone has suggested that there is a continuing problem, Mr. Visclosky. We are taking every step and every effort to eliminate those kinds of things within the system at the White House.

Mr. VISCLOSKY. So for the last six months, the issue under discussion today has not recurred, and things have settled down, as Mr. Darden pointed out, after this always difficult period.

I did not have a special election. I had the luxury of anticipating coming to Washington for about seven months. Nevertheless it was a period filled with unforeseen circumstances. I would certainly align myself with comments made by Mr. Darden.

I appreciate the regularity, if you would, of the conduct that has taken place since April 24th.

Thank you, Mr. Chairman.

Mr. HOYER. Mr. Istook?

AVAILABILITY OF CERTAIN WHITE HOUSE DOCUMENTS

Mr. ISTOOK. Thank you, Mr. Chairman.

Ms. Thomasson, let me ask, before I forget, on a couple of items you mentioned, I appreciate that you brought a copy of the updated White House phone book. You will make a copy available to each Member of the committee?

Ms. THOMASSON. Yes.

Mr. ISTOOK. You also made several references to the newly issued White House personnel manual. Is that something you feel comfortable also in making available to the Members of the committee?

Ms. THOMASSON. I would take that under advisement, Mr. Istook, and I would visit with White House counsel with regard to whether or not that would be a document that could be circulated or not.

STATEMENT OF REPRESENTATIVE ISTOOK

Mr. ISTOOK. Certainly. I would request it. It would certainly, as a freshman, still learning many things about the White House, that would certainly help my understanding and insights. I am sure some other Members of the committee would be interested also.

Let me echo some of the comments at least that Mr. Darden and Mr. Visclosky have stated. Being a freshman I am very sensitive to the transitions, and certainly have sympathy. Knowing how it is for a congressional office transition, I can only imagine how it is for a Presidential transition. I don't care if you are given one day or one year, it is going to be a difficult thing to accomplish.

And, you know, I don't criticize people for having some paperwork difficulties. The real surprise probably would be if you had no difficulties whatsoever. That would be stretching beyond the bounds of belief if there were none. There is always going to be innocent mistakes, and frequently the concern is how you fix things rather than whether problems surfaced in the beginning.

And, of course, you are always concerned if anyone crosses the line to deliberate abuse or disregard or indifference. I certainly hope the fact that questions have been raised is not taken in a partisan way. I noticed even The Washington Post after the GAO report came out characterized it as documenting White House slovenliness and indifference. They labeled it blatant errors that a conscientious and competent team entering office simply wouldn't be expected to make.

I am not asking you to respond to the Post on whether you agree or disagree. I am simply pointing out that the concerns go beyond the ranks of a party label that may be on someone. And I appreciate the chance to have a hearing to discuss things that the GAO report, of course, did establish.

In the testimony that we had from Ms. Kingsbury earlier today, I was very interested in her comments about the extra personnel that were necessary for the GAO to do its work. If I recall correctly, the range of numbers that she used, I believe she indicated it took three or four people working full time for two or three weeks to do the back and forth of copying data down by hand from White House records, going back and putting it in GAO computers, because the White House did not want to make that information available on computer disk, as is customarily done by other agencies of the Executive Branch.

DISCLOSURE OF WHITE HOUSE SALARIES

I would like to ask you, since this stems from the White House desire not to make a public release of the salaries of the people at the White House, can you tell me at what level that decision was made? Is that your decision? Is it the President's personal decision? Is it Mr. McLarty's decision? Who has made that decision?

Ms. THOMASSON. Quite frankly, Mr. Istook, I don't know who made that decision.

Mr. ISTOOK. But it is the policy?

Ms. THOMASSON. It is the policy of the White House not to disclose salaries of the individuals who work at the White House, as it has been the policy of previous White Houses not to disclose that type of salary information.

Mr. ISTOOK. Well, personally, let me say, as a new person here, I frankly don't care what the policy of another administration might have been. I have certainly heard that other administrations sometimes made that information available to the public, sometimes to the Members of the oversight committee, which is this group here.

But who is the highest person, to your knowledge, at the White House who has relayed that decision? If you have not heard it from the President, you have heard it from someone.

Ms. THOMASSON. I heard it from my boss, Mr. Watkins.

Mr. ISTOOK. Who is of course not here, and has declined to be here.

That is the highest ranking person at the White House from whom you have heard this policy stated?

Ms. THOMASSON. He is my immediate supervisor.

Mr. ISTOOK. Is he the highest-ranking person at the White House who to your knowledge has stated this is the White House policy?

Ms. THOMASSON. He is the highest-ranking person at the White House who has made that statement to me personally.

Mr. ISTOOK. Do you know of anyone higher than him who has made the decision? Who have you been told made the decision?

Ms. THOMASSON. I have not been told who made the decision.

Mr. ISTOOK. What is your understanding of who has made the decision?

Ms. THOMASSON. My understanding, Mr. Istook, is that the decision has been made at the White House. I do not know who made the decision at the White House.

Mr. ISTOOK. Do you believe that the President has personally decided that is the standard?

Ms. THOMASSON. I don't have any idea what the President knows with regard to that subject, sir.

Mr. ISTOOK. With your role at the White House administration, having come from Arkansas with the President Clinton, I certainly anticipated you would probably know.

Since we have, as we have discussed here with the GAO, Title 3 standards for White House personnel, and you are aware of their limits on the number of people that can be employed at certain pay levels in the White House, those are statutory, those are under Title 3. There is an annual report that is required to be submitted by the White House to the Congress to show that compliance.

How can we be sure that this law is being followed? How can we perform our oversight duties if the White House does not at least make the payroll information available to us as Members of this committee?

Ms. THOMASSON. Whatever requirements that the law says that we have to report to the Congress, the White House will in fact comply with all of that, sir.

Mr. ISTOOK. If you read the report that just has a summary or range, there are no names, you don't have access to the actual payroll records such as we publish here in Congress, this is the quarter from April 1st to June 30th of this year. You can go through this document, you can see it is very thick because it shows how much we have paid out of our congressional offices for salary.

For example, you can look at page 803 and you can find out by name and amounts how much people in my office have been paid. You can turn to page 765 to find Mr. Hoyer's. Mr. Lightfoot's starting at page 958, and all other Members of this committee. So you have a way to check up on compliance with the law regarding the limits on how much people are paid.

Without access to similar information in the White House, how can we know that you are in compliance with the limits set forth by Title 3 of the United States Code?

Ms. THOMASSON. Mr. Istook, we will make the report as required by the Congress. We will do exactly what the Congress requires us to do with regard to that. I am sure the report has certain standards in it, and we would respond to those standards as requested.

Mr. ISTOOK. But that is not the same, of course, as making the information available that I have discussed and information that Congress routinely makes available to the public about what it pays people.

Ms. THOMASSON. There is a differentiation there, yes.

Mr. ISTOOK. Why? Why does the White House not want a grandmother in Edmund, Oklahoma, a farmer in Billings, other people in this country, why does it not want them to know what you or any other member of the White House staff is being paid?

Ms. THOMASSON. We provided ranges to the committee and we will be glad to provide ranges again for the committee in terms of what the assistants to the President make, what the deputy assistants to the President make, what the ranges are for the special assistants to the President, at a particular date and time. And you all may be able to compare that with what we provided you earlier in the spring. We will be glad to provide you with that information.

Mr. ISTOOK. I am sure everyone is within a range of 1- to half a million dollars each year. That does not give the information or answer the question. Why not make that information available as is routinely done with government employees?

Ms. THOMASSON. It has always been the policy——

Mr. HOYER. Will the gentleman yield? Because I think this bears on your point.

Mr. ISTOOK. If I could hear her answer and then yield.

Mr. HOYER. Sure.

Ms. THOMASSON. Historically, it has not been the policy of any administration, as I understand it, to provide a list of White House employees and their salaries. We would certainly be glad to provide

the committee with the ranges. And I think the ranges are, for example, Special Assistant to the President, range of from $45,000 to $85,000. Deputy Assistants, $85,000 to $110,000 or $115,000, as I recall. Assistants to the President are $115,000 to $125,000. It is not like a dollar to $500,000. We will be glad to provide you with that information.

Mr. ISTOOK. Maybe it is time for a new standard.

PRIVACY ACT PROTECTION OF INFORMATION

Mr. HOYER. Would the gentleman yield?

I first of all appreciate my research assistants for providing me with information I didn't have.

Mr. LIGHTFOOT. Anything to be helpful.

Mr. HOYER. The White House and the Judiciary Branch are not required by statute to disclose that information under the Privacy Act, so that individual employee salaries are kept private. In fact, the Legislative Branch is different in that regard. I will read you the following from the report supplied by Mr. Lightfoot:

"The conferees recognize that the House requirement for reporting names, general title, job description and salary of every individual employed in the White House," which is apparently what the Congress was looking for at that point in time, "is contrary to government-wide rules developed to conform with both the Freedom of Information Act and the Privacy Act."

That is to say, we do not disclose to the people in Mitchelville, Maryland, or Lexington Park, or in your communities in Oklahoma, the specific individual salaries of specific employees. Why? Because we want to keep those employee's personal business private to them. We do not accord the same protection to legislative employees. For whatever reasons, we have made a conscious judgment to make a distinction.

Mr. ISTOOK. Or to other Executive branches.

Mr. HOYER. I believe that is incorrect. You can obtain information on a certain salary because we set them by law. If someone is a GS–15, we have a schedule of what GS–15's are paid. However, if you ask what Sally Jones working at the Justice Department is making, you cannot find out that information. Why? Because we have made a judgment to protect that information under the Freedom of Information Act.

Mr. ISTOOK. My concerns, Mr. Chairman, are public policy concerns, rather than if they are violating the law. I am not accusing the White House of violating a law.

Mr. LIGHTFOOT. I am not an attorney, you two fellows are, but what is your interpretation of the last sentence?

Mr. HOYER. In addition, the conferees have received assurances from the administration that this information will be provided to Congress.

My interpretation is that the Carter administration said, you have a public policy interest in that and we will provide that.

My point is that in Ms. Thomasson's answer, there is a public policy rationale for not disclosing individual salaries, to maintain the privacy of their own salaries. Just because someone is working for the Federal Government does not make them a public officer in the sense that they are elected officials. Obviously the salaries of

elected officials are known. For example, we know the President's salary, we know the Vice President's salary.

That was my point. I just wanted to clarify that. The American public which may be listening and watching clearly believes that they have a right to know how their money is being spent. I agree and I think that is correct. However, I also think that the American public also believes that individuals do have a degree of privacy even if they are Federal employees.

Mr. Istook.

ACCOUNTABILITY OF PUBLIC OFFICIALS

Mr. ISTOOK. Thank you Mr. Chairman.

Just reclaiming my time, as you correctly pointed out, Members of Congress are elected officials. The expenditure by a Member of Congress of public money is therefore made public record. That is a public policy decision which we have made, realizing we need to be held accountable because we are elected officials.

So, too, the President of the United States is a publicly elected official. He too has a staff for which he needs to be held publicly accountable.

I think you can make a very solid distinction between someone who is employed directly by the President of the United States and the White House and the Executive Office of the President, and say there is a much greater public interest in disclosure of that information than of someone that may work as an Agricultural Department inspector or some other position within the government.

This is the a policy debate which, of course, we are expressing. The White House certainly appears to be within its rights at this point in saying they do not choose to make that information available.

However, it is a decision with which I and many others take issue, because of our beliefs in what the public has a right to know.

Mr. WOLF. Would the gentleman yield?

I agree with the gentleman, and one of the questions that I wanted to ask, point out, so the committee can know if what has been said is accurate, Mr. McLarty had said that senior staff would be taking pay cuts of 6 to 10 percent from the levels of their Republican predecessors. We don't know if that has been the case. Just because something is said doesn't mean it is true. And therefore we have no way of verifying that so I think the point that Mr. Istook makes is accurate. The Committee should know and the American public should know.

Mr. VISCLOSKY. Is there an allegation that the committee has been lied to?

Mr. WOLF. I don't know, and I don't know if it has been or not, because I have been asked not to ask all the questions I would like to ask. If the gentleman wants to push it, we can ask the witness to swear in and we can push it. Out of respect for the promise, I didn't ask a number of questions I wanted to ask.

Mr. HOYER. The Chairman wanted to clarify, the reason that the White House may want to keep salaries confidential. I am not a big fan of that book—the Clerk's report—for a lot of reasons, as an employer and for my employees, who feel somewhat exposed.

Mr. ISTOOK. I am sure you have stories about what you have paid people in your office, and it has appeared in the Oklahoma press about the Oklahoma delegation, to which I say, so what? That is democracy in action.

Mr. HOYER. Mr. Istook, you have some additional time left.

Mr. ISTOOK. Thank you, Mr. Chairman.

And just a final comment on that. The reason, too, for us to be concerned as a committee, is because Title 3 places limits on how many people within the White House can be compensated at certain levels of pay. We have no way, I feel, of fully performing our oversight function unless we have direct access to that information.

SALARY REIMBURSEMENTS TO GSA

Ms. Thomasson, now for something completely different. On the GAO report regarding the overlapping payments, I certainly understand that with different pay periods a mistake like that can occur. In fact according to the GAO report, it was the President's staff which noticed the mistake in mid-March and they reported it. So I commend you or whatever staff members were responsible for going back and detecting it.

I am a bit concerned why a really fairly minor amount in the overall budget, $9,000 or so, still six months later has not been reimbursed. Is that because these people don't know? Is it because they have left the staff if is there some resistance? Why is this?

Ms. THOMASSON. Of the 25, Mr. Istook, there are 10 of those 25 who believed sincerely that they had paid back all that was due. They paid back a sum of money, they thought that was in fact the proper amount.

Mr. ISTOOK. So they dispute any claim they might owe any more, those 10?

Ms. THOMASSON. That is right. We found the other 15 later. One of those owes nothing, so there are 14 people who continue to owe money. That ranges in amounts from $20 to $1,200. All but three owe something less than $400. That process is ongoing, and as I said, those notices will go out the 1st of next week, and the employees have every intent of paying those sums back.

Mr. ISTOOK. So these other 14, when was it detected that they had in fact received overlapping payments? It was not mid-March?

Ms. THOMASSON. It was during the General Accounting Office audit.

Mr. ISTOOK. So they are more recent is the reason for the——

Ms. THOMASSON. The time frame is the same, but we did not know about them until a later time, yes.

Mr. ISTOOK. Whose problem is this? Is this the White House's or the GSA? I think the GSA was handling the payroll for the transition team. The White House of course handles White House payroll. Who is taking the lead on this?

Ms. THOMASSON. The General Services Administration is taking the lead on recovering the sums because they are the ones who paid the money out. We are working with them to make their job as easy as possible.

Mr. ISTOOK. So the overpayment was the part they received for the transition team rather than the check from the White House, therefore GSA takes the lead?

Ms. THOMASSON. Yes.

STAFFING LEVELS

Mr. ISTOOK. Let me ask, finally, Ms. Thomasson, and I wouldn't stretch this point, I don't want to change the scope of the hearing. We have had discussions before regarding overall size of the White House payroll. But I did just want to ask now that you have made the changes that you determined to make regarding the size of the staff, are you having any difficulty working with the current numbers? Should there be any anticipation of those numbers creeping back up?

Ms. THOMASSON. It is the intent of the White House to live with the commitment that we made. We are well within—well under that commitment, the 1,044 number we discussed at the last hearing. We anticipate making the commitment and going forward with that, Mr. Istook.

Mr. ISTOOK. So you expect that will you not exceed that number during the next fiscal year between now and, you know, the end of October of 1994?

Ms. THOMASSON. No, sir, on the average for the year I don't.

Mr. ISTOOK. I understand what you mean by the average for the year. I think I do, anyway.

Thank you, Ms. Thomasson.

Mr. HOYER. Thank you.

Mr. Olver.

STATEMENT OF REPRESENTATIVE OLVER

Mr. OLVER. Thank you very much, Mr. Chairman.

Mr. Chairman, I want to make just a couple of comments. I must say that I am somewhat bemused here that after six months of investigation and audit by the GAO which has spent probably $100,000 in doing this investigation, and by an agency which Members of the Committee on both sides of the aisle have said is a very respected, nonpartisan, independent agency of audit, that some of the Members are returning to use as their authority in the discussion comments made by the Washington Times, The Washington Post, going back to April or thereabouts as the authority for characterizations of the discussion.

There seems to be kind of a concerted effort to show that—to establish standards or impose standards that are part of Title 5 onto the proceedings under Title 3, when clearly the statute is very different.

And clearly the GAO, in its respected independent audit, has said that the actions are all within the statutes involved of Title 5 and Title 3. So I must say I am somewhat bemused by that. All of the pay actions under Title 5 and Title 3 come within the statute, as I understand it.

Now, there is one area that I have tried to understand in the discussion between Mr. Wolf and you, Ms. Thomasson, something about where I think there was some miscommunication or misunderstanding of the question. Each I think said I don't understand the question or I don't understand the answer, back and forth here.

PERSONNEL ACTIONS AND BUDGET LIMITATIONS

Is it the case that some of the people who actually worked in the White House during this period of time never got compensated for some of their time because they came on and discovered that the total dollar limitations and the budget end, personnel cap limitations, meant that they would have to forego some compensation, and the dating of their pay beginning would have been guided by what was available in money and the caps after these periods of time which you described as the setting of the total amount of money available under the budgets, and actually they have forgone any pay for some period that they may have been working during that period? I have been trying to understand how this could be coming up here.

Ms. THOMASSON. Let me first say, Mr. Olver, that there were a lot of people who came from the transition to the EOP on January the 20th and January the 21st. They came in the door and started working. They did everything from—when we came, as I understand it and as I have been told, the desks that were in the offices didn't have paper clips in them, didn't have notebooks, had nothing in them, computers didn't work, et cetera. So these people who had been working in a campaign mode up through January the 20th came over to the White House and started doing work, whatever work might be necessary to do.

Most all of those people who came were people who had some indication from the department head or the area that they wanted to work, that they were going to get a job at some point, as soon as they knew how many dollars they had at the White House to spend and how many people they would be able to hire.

There were people who, Mr. Olver, did work at the White House for six weeks, eight weeks, who never did get paid, in fact, but there were no promises made to them that they would have a job when they came to the White House. They just came and worked and helped, and sometimes were assigned to other agencies, sometimes went to private industry, sometimes went back to Arkansas or Ohio or Massachusetts or wherever they came from when they got tired.

But the people who came on January the 20th, who had an indication from their department head that they would have a job, sometimes worked for two or three weeks before they were put on the payroll because the department heads hadn't gotten the numbers, the budget dollars yet.

We had to know, we had to get a reading from the financial management division on January the 20th just how much money would be left. It was not possible to get a hard dollar number until the end of January, although they were massaging those numbers every day for us. As I understand it, it was not possible to get firm numbers until the end of the month.

REPORT OF THE CLERK OF THE HOUSE

Mr. OLVER. I guess I generally understand the process. I would only say about that very thick book over there, that book could probably have implications which are far broader within the office than they are outside the office. I have a feeling that that book is

read by the 20 people or whatever the number is that we have that each of us may have on staff, that number plus or minus 10 other whatever percent, much more assiduously and paid much greater attention to than anybody out in Oklahoma or wherever else.

Mr. HOYER. Mr. Olver, I am reliably informed by members of my staff that this book is affectionately referred to as the hate book, and the first readers of it are the staffs themselves. It is a comparative document.

Any further questions, Mr. Olver?

Mr. Lightfoot, do you have anything you want to say in closing?

FOLLOW-UP QUESTIONS FROM GAO

Mr. LIGHTFOOT. Yes, Mr. Chairman.

First of all, just a little paperwork here. This is the GAO's follow-up to some questions that we asked on the report. I would like to put that in the record if we could. They responded to those.

Mr. HOYER. Without objection.

[The information appears at the end of this hearing.]

SUBSEQUENT PERSONNEL ACTIONS

Mr. LIGHTFOOT. If GAO were to update this little blue report that we have today, would they find any additional retroactive appointments or pay increases at this point in time?

Ms. THOMASSON. Between April the 24th and today?

Mr. LIGHTFOOT. Yes.

Ms. THOMASSON. I don't know how many they would find. There certainly is the potential they would find retroactive appointments or pay increases during that period of time. Procedures that we have set up that we have discussed here today were sorted out in the mid-summer, finalized in the month of September. We have done everything we can do mitigate those retroactive-type things.

The GAO has told us that it would be more advisable to prospectively raise people's salaries if they hadn't been paid appropriately in the past as opposed to historically paying them the money that they were due. I am sure that we could have a great debate about whether it is better to pay them prospectively or retrospectively. It is more fair—and it seems more reasonable—to pay them for the actual days they worked rather than to artificially inflate their salary for the future and decrease it when they have in fact received their money. But that is a bigger debate than I think we have time for. But we are making every effort to make sure people are paid correctly and on time.

Mr. LIGHTFOOT. Would you provide that for the record for us, what has happened between April 24th and today, the numbers of—just how many retroactive they have put on and back-dated and so on? I am not doing it in an accusatory-type sense, but you said you have taken steps. I think if anything it would help prove you have a handle on that situation.

Ms. THOMASSON. We will look at that and work with you on that information.

STATEMENT OF REPRESENTATIVE LIGHTFOOT

Mr. LIGHTFOOT. Just one quick statement, one question, Mr. Chairman. We are 10 minutes behind when you wanted to recess anyway. I appreciate your patience.

Maybe so that you can understand some of the dynamics that are driving some of this is from what we are hearing from the Federal employees, the career people. OPM tells us it costs about $9,800 to RIF somebody. We have RIF'ed a number of folks, roughly $1 million or more. Some of the folks that are being RIF'ed, the people that are being brought in are getting salaries larger than what they were, at least that is their perception.

I think there is a public relations problem that you all are going to have to deal with. I am not going to recommend how you do it, because I don't know.

This is part of what is driving a lot of the—to answer Mr. Olver and Mr. Darden's question, why this is a big deal. This is really a big deal to career employees who have spent 25, or 30 years, and then they see practices they have worked through successfully in various administrations basically being ignored, and many of them are losing their jobs. Those are some of the dynamics that are behind this thing, that are driving it.

Again, I appreciate you coming. I just ask you one final question, which may or may not clear the air. And Mr. Hoyer made the comment earlier that—in essence, Dee Dee Myers said when this was first brought out in a press conference, that these were just mistakes, they were errors that were made. Mr. Watkins then came out later and said that they were necessary for budget purposes, even though he had issued a memo strictly prohibiting back-dating of payroll.

Which is it? Was it a mistake? Was it intentional?

Ms. THOMASSON. Mr. Lightfoot, I don't think we intentionally made mistakes. That is not normal process. If there were appointments that needed to be made, people had worked, commitments had been made by department heads to pay these people from a beginning date. We took the necessary steps to correct all the paperwork to reflect the time the employee was at the White House doing the work that they were charged with and to see they were in fact paid because they were de facto employees of the White House during that period of time.

Mr. LIGHTFOOT. I thank you again for coming.

Mr. Chairman, thank you.

CONCLUDING STATEMENT OF REPRESENTATIVE HOYER

Mr. HOYER. Thank you, Mr. Lightfoot.

We are going to bring this hearing to a close. Let me say in closing, it would not normally be my inclination to have hearings on reports that say everything was done legally, which is essentially what the GAO report said: The actions taken were consistent with the authority that the President has under Title 3.

I want to make a couple of further comments. I did not talk to Mr. Watkins personally, so there was no personal invitation to Mr. Watkins.

Mr. LIGHTFOOT. I have been misinformed.

Mr. HOYER. That is all right. But I don't want any implication that Mr. Watkins refused to come, because that is not the case.

I was informed, correctly, that this is Ms. Thomasson's responsibility. Ms. Thomasson does handle, as is the case in previous White House administrations, the employee records and the personnel actions and the administration at the White House. So I think she was an appropriate person to come and to be here.

The bottom line, it seems to me, is this. GAO has said they had the records and the White House cooperated in providing them with the information necessary to answer the questions asked in the letter of Mr. Lightfoot and Mr. Wolf and Mr. Istook. They found no illegality in the actions that were taken. They did find some small overlaps.

They explained that some people moved from the Transition Office and had overlapping pay because the pay periods were not contemporaneous, and therefore dual payments made. We have been assured the overlap was a day or two days, some perhaps a little longer, but relatively minor amounts are owed.

There is obviously a dispute, according to Ms. Thomasson, by some employees that they have paid all the money back, but there may be some due and owing. Obviously the GSA on Monday, as I understand it, is going to send out notices which presumably will give to employees the specific numbers that are due. I think it is pretty understandable how that could happen and obviously it appears not to be an intentional double dipping, but an overlap.

There has been a lot of discussion about back-dating. Back-dating can have some bad connotations to it. However, as I understand the testimony of GAO and of Ms. Thomasson, essentially the personnel actions were dated as of the dates that the representations had been made that certain personnel actions would occur, either level of salaries or when work actually started. In fact there has not been any findings by GAO or, as I understand, any credible evidence or allegations that people were paid who were not working. So, in fact, all of the people who were paid were paid for doing work, which I think has been observed, as equitable.

Mr. Lightfoot has, I think very candidly, and I think correctly, observed that there are some employees who were asked to do things who may be disgruntled employees. I have had some of these people come to my office. I have even had some communication with the White House advising them that those employees who talked to me weren't too pleased. It is also understandable and desirable that they would contact people such as their Congressman. I don't have any problem with that. In fact, that is many times how we find out things in government, because we have employees who were perhaps disgruntled, saying how things were done wrong, and we ought to check up on that.

While I said at the beginning that it would not normally be my intention to have hearings on GAO reports saying that we looked at it and nothing is wrong, I think in this area it was appropriate, and I was pleased, as I said at the outset, to agree to Mr. Lightfoot's request that we clear the air so there is no implication that we are trying to cover up anything. I feel a particular responsibility because this is a Democratic administration that I support.

At the same time, we all have a responsibility, both in the White House and in the Congress, to make sure we are spending the people's money legally and appropriately. I have no reason to believe as a result of the GAO study or anything I have heard at this hearing, that the public's money was being spent in any way other than appropriately or legally.

Ms. Thomasson, I appreciate very much the opportunity we had to hear your testimony. We look forward to working with you in the future to make sure that we continue to have open communication and information for the public that pays our salaries, and ultimately, has a right to know what we are doing.

Thank you very much.

Ms. THOMASSON. Thank you.

[Questions for the record and the answers thereto follow:]

ANSWERS TO QUESTIONS FOR THE RECORD SUBMITTED BY REPRESENTATIVE LIGHTFOOT FOLLOWING PATSY L. THOMASSON'S TESTIMONY ON OCTOBER 22, 1993

1. Why did Mr. Watkins reverse his position from his January memo which stated, "There is no backdating in the federal government." by later permitting backdating of personnel actions to occur?

Because the memorandum was addressed to all department heads, which included some Title V agencies, the memo stated the standard practice regarding Title V federal employees (civil service employees) whereby an appointment typically becomes effective in the pay period after it is processed. As the GAO Report found, Title III, the governing statute for the President's personal staff, allows more flexibility in setting the terms of appointment and compensation. Despite this flexibility, most appointments occurred in the same pay period that the individual began work. In those cases that did involve retrospective action, Title III employees had begun working under appointment agreements with their supervisors before their paperwork had been received and processed by the Office of Management and Administration. These appointments were retroactive only in the sense that they were processed after the individual employee had begun work. In all instances, the appointments reflected work actually performed. As the GAO Report acknowledged, these employees who had been working and were authorized to do so were de facto employees. Moreover, the GAO Report found that these retroactive appointments were proper under Title III.

2. Was backdating of pay increases and appointments intentional, as Mr. Watkins was quoted in the press, or was it error, as Dee Dee Myers was quoted in the press?

As discussed above, some appointments and salary adjustments (both increases and decreases) were entered retroactively through the central payroll system. As the GAO Report accepted, however, the employees had previously agreed with their supervisors to begin work under specific terms and conditions. Thus, the retroactive appointments and salary adjustments honored previous commitments and compensated employees for work actually performed.

Moreover, as the GAO Report found, eighty percent of the retroactive appointments made between January 20 and April 24 were only one pay period late. Similarly, retroactive salary increases and decreases constituted only a small fraction of the total number of personnel actions. Additionally, as the GAO Report found, the number of retroactive appointments and salary adjustments declined sharply over time.

There is no dispute that the President has the legal authority under Title III to make retroactive appointments or retroactive salary adjustments, to compensate employees.

3. When did Mr. Watkins or anyone in his office first become aware of dual payments to White House employees from the Transition Office account?

The Office of Management and Administration first learned of the existence of dual payments in February when a White House staff member received a check from GSA for their transition work after the employee had begun working at the Executive Office of the President. Since the transition pay period and the Executive Office pay periods did not coincide and the first Executive Office pay checks were not issued until early February, any overlapping compensation was not discovered immediately.

4. Who authorized the backdating of personnel actions and specifically told White Office of Administration career employees to take such actions?

These appointments were retroactive only in the sense that they were processed after the individual employee had begun work. In all instances, the appointments reflected work actually performed. As the GAO Report acknowledged, these employees who had been working and were authorized to do so were de facto employees. Moreover, the GAO Report found that these retroactive appointments were proper under Title III.

All personnel actions were approved by the Office of Management and Administration and forwarded to the Director of White House Personnel for coordination with the Office of Administration.

5. According to GAO, there is a memo in Robert Rubin's personnel file advising against the backdating of Mr. Rubin's appointment. Why was this disregarded? Did anyone in the White House advise against backdating of personnel actions, either in writing or verbally?

Mr Rubin started work on January 20, 1993. It was decided that Mr. Rubin's appointment would begin on March 1, 1993 and that decision was communicated to the appropriate offices. Yet, the payroll action was not processed in a timely manner. When it was learned that Mr. Rubin's appointment had not been effected, steps were taken to correct the error and to appoint Mr. Rubin -- by then a de facto employee -- effective March 1 as had been agreed. In this instance, the April memorandum's author simply did not know the facts. Mr Rubin had been a de facto employee and his appointment had been approved beginning March 1. Only a clerical problem prevented Mr. Rubin from being placed on the payroll from that date.

In making decisions regarding whether payroll actions for Title III employees could be effected retroactively when a prior agreement had been reached between an employee and an agency for the appointment date, responsible personnel consulted numerous staff persons who gave conflicting opinions. However, those familiar with Title III and with Title V precedent advised that de facto employees could properly be compensated for work already performed even if an employee had not been entered into the central payroll system at the time of his or her actual starting date. The GAO conclusion confirms the correctness of this advice.

6. Please list for the record any additional payroll actions which have been backdated, either pay increases or appointments, since April 24, 1993. Please specify amounts of raises, retroactive payments, base pay, dates processed, and effective dates.

The GAO report found that some payroll actions before April 24 were taken retroactively, in that they were processed after the effective date of the appointing agreement between the employee and the supervisor. The GAO found these actions proper for Title III employees since the actions compensated de facto employees for work actually performed.

A small number of these types of retroactive actions have occurred since April 24. In all instances outlined below, the appointments reflected work actually performed. The GAO Report found that retroactive appointments and salary adjustments such as these were proper under Title III, which is applicable in all these instances.

Statistics on those actions that have been processed in a pay period after that of the effective date of the appointment agreement, from April 24 to October 23, are as follows:

- Of the 127 appointments processed between April 24 and October 23, ten appointments have been processed in the pay period immediately following the pay period of the appointments' effective date. Of those 127, five -- or 3.9 per cent -- were processed more than one pay period following the pay period of the appointment's effective date. In all instances, the payroll actions compensated employees who had begun work under an agreement with their supervisor.

- Since the start of the new fiscal year -- October 1, 1993 -- all appointments have been processed in the same pay period as the effective date of the appointment.

- In the period between April 24 and October 1, 1993, there were eighteen salary adjustments -- including one salary decrease -- processed in the pay period immediately following the pay period of the adjustment's effective date. There were three salary adjustments processed more than one pay period following the pay period of the adjustment's effective date.

- Since the start of the new fiscal year -- October 1, 1993 -- all salary adjustments have been processed in the same pay period as the effective date of the adjustment.

7. Do all White House employees who received dual pay from the White House and Transition intend to refund the transition office payments they received which overlapped?

Each person that received overlapping compensation from the Transition and the Executive Office of the President was contacted and notified between August and early October that the General Services Administration would be contacting them regarding payment of such overlapping compensation. The Executive Office of the President expects all employees who received any overlapping compensation to reimburse the GSA for any funds owed.

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-254766

October 8, 1993

The Honorable Jim Lightfoot
House of Representatives

Dear Mr. Lightfoot:

In your letter of September 14, 1993, you requested answers to questions on a number of matters discussed in our report entitled Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President (GAO/GGD-93-148, Sept. 9, 1993). In that report, we provided information on a number of retroactive appointments and pay actions that were made under the employment authorities provided to the President under title 3 of the U.S. Code. Our responses to your questions are provided in enclosure I to this letter.

I hope this additional information is helpful in your consideration of our concern as to whether the broad interpretation of title 3 made by the White House and the Department of Justice's Office of Legal Counsel clearly reflects Congress' wishes concerning the scope of the President's authority. If you have further questions about our report, feel free to call me on (202) 512-5074.

Sincerely yours,

Nancy Kingsbury

Nancy Kingsbury
Director
Federal Human Resource Management
Issues

REPRESENTATIVE LIGHTFOOT'S QUESTIONS AND GAO'S RESPONSES

1. Did you inquire as to whether any memos or internal correspondence existed which discussed the issue of payroll backdating in the White House, either reco-mending or not recommending it, in addition to the undated memo circulated by David Watkins which stated, "...there is no backdating in the Federal government."? For example, I have been told there was a memo in Robert Rubin's personnel file recommending against Mr. Rubin's appointment being backdated. If GAO did inquire about this, did White House officials tell GAO no such correspondence or memos existed, or did they simply not make them available to GAO? If such memos or correspondence exist, I would like to know the dates they were originated.

As part of our review, we asked for all available memoranda, correspondence, and instructions that discussed terminating existing employees and appointing new employees in the Executive Office of the President (EOP). The only documents provided to us that discussed the overall issue of backdating, i.e., retroactive appointments and pay adjustments, were the undated memorandum from Mr. Watkins and the Department of Justice's Office of Legal Counsel memoranda, which were included in our final report. Although we did not document the number of occurrences, most, if not all, of the personnel files we reviewed contained such documents as Standard Form 52s or WHP-1s[1] authorizing the retroactive personnel actions for individual employees. Some of these files also contained memoranda for such personnel actions as establishing individuals' pay rates or requesting adjustments in individuals' salaries.

Mr. Rubin's appointment documents were originally prepared in January for an effective appointment date of January 20 but were not processed until April 23, with an actual appointment date of March 1, 1993. Mr. Rubin's personnel file contained an April 22, 1993, memorandum from a White House Office personnel official recommending that his appointment be made no earlier than April 11, the beginning of the then current pay period.

At the time we reviewed Mr. Rubin's file, he had already been appointed effective March 1, and we were aware that he had provided services before and after that date. Thus, as was the case with other retroactive appointments, he was a de facto employee and entitled to be paid for his services. In addition, since we were aware that he had filed his public financial disclosure report on February 19, 1993, which was prior to his

[1]A WHP-1 is an alternative form used by the White House to initiate a personnel action.

appointment date and thus timely, we did not have any basis to question his appointment further.

2. What exactly were the "certifications" provided by White House officials on which GAO relied to ascertain whether White House employees were present and working in the White House for the period of time they received backdated pay? Why did GAO choose to accept these forms as "proof" that the employee worked for that period?

In general, no contemporaneous biweekly time and attendance records approved by supervisors existed for the employees whose records we examined. Timekeeping was done to record exceptions to an employee's regular work schedule and to authorize retroactive payments. Enclosure II contains a copy of the leave and pay adjustments form used by timekeepers and certifying officials at the White House to approve payroll adjustments. Such forms were used to authorize the retroactive payments we examined. Because timekeepers and certifying officials were not always the supervisors of the retroactively appointed employees, we asked that employees' supervisors sign the forms and thereby certify that the employees had actually worked. We considered the supervisory attestations to be the best available evidence that the employees worked during the retroactive periods in question.

3. With respect to employees who received dual pay and began refunding money to the Presidential Transition Account, on what date did these refunds begin, to the best of your knowledge? Did GAO ask GSA to provide documentation as to when these refunds were received? Did you ask why GSA was unable to provide you with documentation as to when refund checks were received? Why wouldn't proper accounting procedures have been followed with respect to these public funds?

A General Services Administration (GSA) systems accountant told us that the White House returned the checks issued to or written by 10 of these individuals from late April 1993 and to late June 1993. Four individuals returned the government checks they originally received from the transition payroll, while the other six wrote personal checks for the amounts they received from the transition payroll. We obtained copies of all returned checks.

The GSA official said the four government checks were returned to GSA in late April. She added that it was possible that some of these individuals returned their government checks to the White House as early as mid-March and the White House did not forward them to GSA until late April. Two of the personal checks were dated May 3 and May 5 and were recorded by GSA as being received on June 17. The GSA official told us that the other four

personal checks were dated from June 22 to June 24 and were received by GSA during the last week of June.

We concentrated our efforts on ensuring that appropriate actions would be taken with regard to the individuals we identified as receiving pay for overlapping periods of employment. We did not attempt to determine the specific dates GSA received each of the checks. GSA's accounting procedures for recording the receipt of these funds were not within the scope of our review.

4. According to GAO investigators, a GSA employee stated that there had been a contact from the office of David Watkins in the White House about the possibility of changing the ending employment dates of Transition employees who were put on the White House payroll. Did GAO ask on what date that conversation occurred? Is there no record of that conversation/communication?

The GSA official told us that this conversation took place near the end of April 1993. The conversation followed the return of the four government checks and also served to inform GSA that six other individuals would be writing personal checks to reimburse the transition fund. It was in this context that the matter of changing ending employment dates was discussed. This individual told us that the specific date of the conversation with Mr. Watkins' office was not recorded and that she could not recall the specific date.

5. Also, GAO's report states that EOP staff had notified GSA of the possibility of overpayment (dual pay from Transition and White House accounts) in mid-March. Can this contact be verified? Did GAO attempt to verify the date, or did GAO simply rely on White House statements to this effect?

The mid-March notification relates to a conversation initiated by EOP staff, prior to the April call referred to in question 4, regarding the possibility of overpayments to transition employees. We relied on the statement of the GSA official. Without a contemporaneous record of the call, we could not otherwise verify the date.

6. Did GAO ask on what date the White House first levied fines against those White House officials who failed to file Public Financial Disclosure forms? If not, why not? Did the White House fail to respond to this question?

We did not ask on what date or dates the fines were levied. However, we did obtain a copy of a July 27, 1993, memorandum from a White House counsel to the Office of Administration's Financial Management Division that transmitted the two individuals' checks for forwarding to the Department of the Treasury. Having

determined that fines had been paid, we did not see the need to determine the specific date or dates the fines were levied. Rather, we focused on determining whether other individuals who did not file timely reports would also be fined or whether waivers had been requested and received from the Office of Government Ethics.

7. In the final report, GAO refers to certain retroactive payroll actions as "proper." Why did GAO use the term "proper?" This term implies GAO condones these retroactive actions. Is this true?

In view of the statute's broad language, we had no basis to question these payroll actions, and we therefore characterized them as proper within the statutory authority under which they were made. Our use of the term "proper" was meant to convey the meaning that the President's actions were legal. However, as indicated in our report, we were concerned as to the potential for abuse in light of the broad authority provided in the statute. We therefore suggested that clarification of the President's authority may be desirable.

8. With respect to dual pay received by White House employees from the Transition Account, GAO states, "The White House and Office of Administration officials are in the process of determining if these employees have been unduly compensated." If White House employees have already begun refunding payments to the Transition Account, the White House must have already determined that these employees were, in fact, unduly compensated. Why did GAO not question this statement?

White House officials agreed with us that it was not appropriate for individuals to receive pay from both the transition fund and EOP for the same periods and said they would take action to rectify such situations where they occurred. The questions that remained at the time our report was issued were the amounts owed by the 9 individuals who previously refunded transition pay and the amounts owed by the other 15 individuals we identified. Since we provided the White House with the names of the 24 individuals and our estimate of each overpayment shortly before issuing our report, and the White House had not completed its review of our estimates, we considered the White House's response appropriate.

9. Why did GAO not rule on the above dual payments?

As noted in our response to question 8, White House officials agreed it was not appropriate for employees to receive overlapping compensation. Accordingly, we did not deem it necessary to issue a formal ruling or include in our report an

extended discussion of the basis for a conclusion that the dual payments were inappropriate.

10. One of three reasons listed in GAO's report for untimely appointments was, "...the time needed by OA to process documents once this approval was obtained." Did GAO interview any OA employees involved in processing appointments to obtain information on the average amount of time it takes for appointments to be processed? Did GAO ask to talk to any such individuals? Did White House officials refuse to allow GAO investigators to talk to such individuals?

We did not specifically ask OA's Acting Personnel Director about average times for processing personnel actions. We observed and discussed with OA staff their usual procedures for the processing of appointment documents. Typical documents that needed to be processed included forms for the withholding of federal and state income taxes, the withholding of health and life insurance premiums, the oath of office, the electronic transfer of payroll funds, and home and office mailing addresses. On the basis of these observations and discussions, a personnel specialist could, in our opinion, review an appointee's paperwork in 1 to 2 days, depending on the individual's or appointing official's availability to respond to questions that might arise.

While routine processing at the time we were completing our work appeared to take only a few days, there were processing delays during the early weeks of the administration when large numbers of personnel actions were processed. As indicated on page 7 of our final report, 205 of the 611 new appointments were processed between January 20 and 30, 1993 (the first pay period of the new administration). Additionally, 151 new appointments were processed in the pay period ending February 13, 1993. In total, 356 of the 611 new appointments (58 percent) were processed in the first 2 pay periods of the new administration.

11. GAO's report details the circumstances of two Title 5 employees who received retroactive pay adjustments. Did GAO request or receive similar details on the Title 3 employees who received retroactive pay adjustments? If not, why?

We obtained detailed information concerning when and why each of the title 3 employees received retroactive pay adjustments, but we did not deem it necessary to describe those details in our report in view of the President's broad statutory authority under title 3. We reported the details of each of the two title 5 cases because the details differed and the facts were more critical to an analysis of legality under title 5.

12. GAO's report also states, "For each...who received retroactive pay adjustments, we obtained and discussed additional facts with White House Office and Office of Administration officials." Please elaborate.

That statement, contained on page 11 of our final report, was intended to introduce the material that followed. As discussed later in the report, we obtained explanations from White House Office and OA officials on the rationale for the retroactive pay adjustments and signed certifications where possible from the appointing officials involved.

13. I would like GAO to provide me with a breakdown of EOP employees who received retroactive appointments and pay adjustments, by White House agency, i.e. White House Office, Office of Special Assistance to the President, etc.

Table I.1: Number of Retroactive Appointments by EOP Agency

EOP agency	Total number of appointments	Number of retroactive appointments	Number of pay periods late appointments processed				
			One	Two	Three	Four	Nine
Council on Environmental Quality	3	3	3	0	0	0	0
National Security Council	17	5	3	2	0	0	0
Office of Management and Budget	22	2	2	0	0	0	0
Office of Policy Development	35	10	8	1	0	1	0
Office of Science and Technology Policy	9	3	3	0	0	0	0
Office of the Vice President	20	2	1	0	0	1	0
Other EOP offices	61	0	0	0	0	0	0
White House Office	444	205	165	30	7	2	1
Total	611	230	185	33	7	4	1

Table I.2: Number of Pay Adjustments by EOP Agency

EOP agency	Number of pay adjustments	Increases	Decreases	Number of retroactive pay adjustments
Office of Management and Budget	2	2	0	1
Office of Policy Development	4	3	1	1
Office of Administration	2	2	0	1
Council of Economic Advisors	1	1	0	0
Office of National Drug Control Policy	1	1	0	0
Office of the U.S. Trade Representative	5	3	2	1
White House Office	54	46[a]	8	26
Totals	69	58	11	30

Note: Two employees received more than one salary increase.

14. Did GAO determine whether the documentation White House officials provided for retroactive payroll actions was prepared retroactively? Were the "certification" forms dated, and if so, were they backdated?

We did not attempt to determine if the documents for the retroactive personnel and pay actions were backdated because they were already dated after the effective appointment dates. For 41 of the 45 employees with retroactive appointments that were 2 or more pay periods late, we requested signed certifications from their supervisors that they worked during the periods covered by their appointments. On June 11, the White House agreed to provide us with these certifications. We considered the certifications necessary because other contemporaneous evidence indicating supervisory approval of hours worked did not exist. The supervisors signed but did not date these certifications.

15. GAO 's report stated, "They (White House officials) also said that the overload of existing processes and procedures contributed to the need for retroactive appointments." What did White House officials mean by "overload of existing processes and procedures?" Did GAO ask them to define this?

We did not ask for an explanation of this term. See also our response to question 10.

16. On page 18 [page 17 of final report] of GAO's report, discussing "Nine Employees Were Overpaid," it is unclear if these employees are a separate group from the 25 employees who received dual pay from the Transition and the White House accounts. GAO's report indicates "...collection actions have been started." Would you please clarify this?

These nine individuals are a separate group from those who received dual pay from the White House and the transition fund. In each of these cases, the original appointment dates were changed to a later appointment date. Because these employees had been paid based on the original appointment date, the changes to later appointment dates resulted in overpayments. White House officials concurred with our analysis and told us that collection actions had been started. Because of the deadline for the completion of our work, we did not verify whether these collection actions had been completed.

17. GAO's report indicates two individuals paid fines for failing to file timely Public Financial Disclosure reports. On what date were these individuals fined, and when was it discovered that they had not complied? Did GAO ask these questions? If not, why?

See our response to question 6. For this review, we were concerned primarily with whether appropriate actions were taken with regard to the employees who did not file in a timely manner.

(995279)

ENCLOSURE II

ENCLOSURE II

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF ADMINISTRATION

AUTOMATED PAYROLL, COST AND PERSONNEL SYSTEM

Leave and Pay Adjustments Form

TO Defense Electronics Supply Center Payroll Office

THROUGH: Office of Administration Personnel Management Division

FROM:

DATE

Instruction: This form authorizes Timekeepers to add or delete any entries to an employee's previous certified time card. Form must arrive in the Personnel Management Office *no later than the second Wednesday before the end of a pay period* to be effective in the employee's salary check for the current pay period.

Please make the following corrections:

NAME: _____

SOCIAL SECURITY NUMBER: _____

PAYROLL BLOCK: _____

PAY PERIOD ENDING: _____

HOURS CHARGED			CORRECT HOURS		
DATE	HOURS CODE	NO. HOURS	DATE	HOURS CODE	NO. HOURS

HOURS CODE

R=Reg Hrs	P=Ann Lv	B=Restored LV	N=Ngt Diff
V=OT Hrs	O=Sick Lv	S=Sunday	E=Env Hrs
H=Hol Wkd	W=LWOP	U=Suspension	C=Cmptm Wkd
A=Admin Lv	X=AWOL	M=Mil Lv	G=Hazard
J=Jury Duty	I=Hol Tkn	F=Furlough	K=Dsbcmpn N/P
Y=Rel Wkd	Z=Rel Tkn	T=Cmptm Tkn	D=Non-Duty Hrs

_____
(Signature of Certifier)

Return form to : Personnel Management Division
10 NEOB, Room 4013

OA FORM 44

FRIDAY, OCTOBER 22, 1993.

FOLLOW-UP TO HEARING ON ATF ACTIONS DURING WACO, TEXAS RAID

WITNESSES

RONALD NOBLE, ASSISTANT SECRETARY, ENFORCEMENT, DEPARTMENT OF THE TREASURY

JOHN W. MAGAW, ACTING DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

CHARLES R. THOMSON, JR., ACTING ASSOCIATE DIRECTOR, LAW ENFORCEMENT

CHAIRMAN'S OPENING STATEMENT

Mr. HOYER. The committee will come to order.

Today the committee will receive testimony from the Department of Treasury and the Bureau of Alcohol, Tobacco and Firearms regarding the report on the investigation of Vernon Wayne Howell, also known as David Koresh.

I promised at the close of our initial hearing on the Waco, Texas mission, that the committee would reconvene once the report was completed. I would like to thank the department for providing a comprehensive report as scheduled.

The purpose of today's hearing is to discuss the principle findings in the report, and to allow Treasury and BATF the opportunity to communicate to the committee the lessons learned from this tragedy and what has been and what will be done in the future to reduce the probability of this reoccurring.

The committee understands the difficult nature of law enforcement operations and appreciates the difficulty involved in reviewing such missions. We realize that the outcome of these operations are sometimes hard to predict and even to comprehend. The report does a good job, in my opinion, in explaining what actually occurred and fairly and accurately reporting the mistakes that were made and naming the individuals that made them. I know that was difficult, but it was necessary.

Many lives clearly were affected by this incident. It will long be remembered as one of BATF's most tragic days. It is our hope today that the lessons learned from this tragedy will continue to remind BATF and all other law enforcement agencies of the necessity of both proper planning and proper execution when undertaking law enforcement operations.

I appreciate your appearance before the committee and want to say that in addition to providing the report in a timely fashion, I also appreciate the briefing that we received prior to the final report issuance so that we would have knowledge before it was issued to the public of what its contents were.

I know that it was a difficult report to prepare and to write. But as I said in my opening statement, a necessary one.

ACKNOWLEDGEMENT OF MR. HIGGINS AND MR. MAGAW

I also want to recognize that we have a new director of ATF. I want to say for the record that Steve Higgins, the former director of ATF, worked with this committee closely over a decade. It was my opinion then and now that Mr. Higgins did an excellent job in working with this committee and in leading ATF.

It is a truism, I suppose in most instances where operations go wrong, the buck essentially stops at the leadership position. That is an appropriate happenstance. On the other hand, it appears from the report, and from my discussions with all of those involved, including yourself, Mr. Secretary, that the final report seems to indicate unfortunately in this matter, it was not Mr. Higgins' personal decisions that led either to the manner of the execution of this mission or in the decisions tragically made to go ahead with this mission after the discovery by the people in the compound of the operation going forward, thereby losing the "element of surprise" which was the essential scope of the operation.

Nevertheless, it is understandable, but I did not want the hearing to proceed without making that comment with respect to Mr. Higgins for whom I have a great deal of respect. At the same time, we are very pleased that such an able law enforcement official who has a distinguished career in the Secret Service and although short, nevertheless, distinguished career heading the United States Secret Service. I think ATF will profit, as will the country, from his leadership of this agency, and I congratulate him for undertaking this responsibility.

I have observed, too, Mr. Magaw, and Mr. Secretary would mention to you, I am hopeful that the appropriate actions will be taken so that Mr. Magaw's tenure at ATF does not need to be a short-term one. Obviously, he has been in the service a long time.

Mr. NOBLE. I understand.

Mr. HOYER. The reason I say that is I think we need to bring a degree of stability to ATF. They have been through some turbulent and tragic times and I think it is in the best interest of personnel at ATF who are courageous, committed public servants to give them the kind of leadership that will stabilize their agency and give them a sense that there is a continuing mission and a continuing respect and faith that the country has, that the executive department has, and that the Congress has in their operations. Mr. Lightfoot?

OPENING STATEMENT OF MR. LIGHTFOOT

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

And I would like to associate myself with your remarks about Mr. Magaw and Mr. Higgins. I am not as eloquent a speaker as you are, but I think the people of this country have been more than adequately served by two gentlemen who have my highest degree of respect, and I think are excellent examples of what public service should be. And we certainly wish Steve Higgins the best in his endeavors and John Magaw the best in now taking over as the head of ATF. It is a big job but you are a big man and I think you will handle it quite well.

Mr. Noble, thank you for coming again. And Mr. Thomson, welcome to Disneyland East from New York. We are glad to have you here as well. I think the Treasury Department's report—and I have to admit this is one of the few reports that I read from cover to cover, but I did. I think it was quite thorough in its findings and brought to light some of the flaws which is what we were trying to achieve in the first place; it was to learn from our experiences. And the goal, obviously, is not to repeat what happened in Waco and try to learn from that and being able to do a better job in the future. It is a tragic occurrence, and I don't think anyone would argue that point.

But I think that if we can correct the mistakes and somehow foresee into the future how we are going to handle these situations—there will be more of them, I think that is a given—that maybe we can prevent something like this happening again. And I think that is what the Chairman had in mind from the very beginning. At least that was my understanding when we had the first hearing and it was to basically use this as a learning experience, not looking for scapegoats, not trying to hang anybody but just to go back and see what happened and try to apply a cold, logical eye to it and learn from what happened.

So, again, the blue book is probably as thorough a story as we will ever get. There are a lot of conclusions in there. I think I would have to agree as well. But I was going to make some comments to the effect that I hope that this report wasn't going to be used as a tool to dismantle ATF and DEA and so on and merge them all in with the FBI as we have been hearing that there is a move to do here on the Hill.

Just as we sat down, Mr. Chairman, and I don't like to necessarily go to the newspapers for my facts, but this was just handed to me. Apparently yesterday our colleague from Wisconsin, Jim Sensenbrenner, had before him Deputy Attorney General Philip Heymann, who was testifying before the House Judiciary Subcommittee on Crime and Criminal Justice, discussing the Vice President's recommendation in his National Performance Review to merge drug enforcement with FBI. And his comment was that that was a printing error and does not reflect the views of the Administration.

And so I hope that that is in fact true and that will no longer be an issue. I personally don't think that is a wise thing to merge them together. They each have their own areas of responsibility and do a good job.

Again, gentlemen, thank you for coming and thank you, Mr. Chairman, for the way you have conducted these hearings, with the idea of putting a positive light on what has happened and trying to figure out things that we can do to prevent something going wrong in the future. That is a pretty good ideal.

Mr. HOYER. Thank you, Mr. Lightfoot. Mr. Visclosky?

Mr. VISCLOSKY. No comments.

Mr. HOYER. Mr. Darden?

Mr. DARDEN. No comments. Thank you.

Mr. HOYER. Mr. Secretary, we will recognize you. Your statement as presented to us will be included in the record in full and you can proceed in such manner as you deem appropriate.

75-217 O - 94 - 5

Mr. NOBLE. Thank you, Mr. Chairman, members of the committee.

I would like to thank the committee and you, Mr. Chairman, for the support and patience which you have extended to the Department of Treasury while we conducted our lengthy and searching review of the events leading up to the assault on the Branch Davidian compound. As you will recall, when the Chairman first convened hearings in June of this year, we were concerned about the effect hearings might have on our pending investigation as well as the important criminal prosecution in Waco.

The Chairman and Members of this committee were sensitive to our concerns and demonstrated a willingness to work with us cooperatively to reach a sound accommodation of the many interests and issues presented by the various inquiries. I hope and believe that the report we issued is worthy of the confidence you showed in our ability to conduct a thorough, fair, and impartial investigation.

I want to take a moment to thank each of you individually and you as a committee collectively for not commenting publicly about the facts until we had a chance to develop a report. It took a large amount of courage not to comment in face of the video coverage and the relentless approach of the media. We thank you for taking the time and allowing us to conduct this thorough investigation.

The investigation produced a report that is more than 500 pages long. It reflects the hard work and dedication of many individuals. The day-to-day direction of the investigation was directed by the project director, H. Geoffrey Moulton, Jr., a former Federal prosecutor who earlier was a law clerk for Chief Justice William Rehnquist.

With me here today are the two assistant project directors, David Douglass, who is currently on leave from private practice at Wiley, Rein & Fielding, and Special Agent Lewis C. Merletti. He is presently the deputy assistant director with the Secret Service.

To assure the American people that the report would be an uncompromising examination of the events leading up to the tragedy on February 28, we reached beyond the Treasury Department. We consulted 10 non–Treasury experts in tactical operations, firearms, and explosives. The investigation and report were guided by three independent reviewers of national prominence and unquestioned integrity, Edwin O. Guthman, a Pulitzer prize winning journalist; Henry Ruth, a longtime justice official; and Willie L. Williams, chief of the Los Angeles Police Department.

All of the experts and independent reviewers served without pay and put in many long hours reviewing reports, viewing videotapes, meeting with the investigative team and ATF agencies. They brought unmatched experience and provided invaluable insight.

I would be remiss not mentioning one final group without whom we could not have carried out the mandate of President Clinton and Secretary Bentsen, to conduct a vigorous and thorough review of the events in Waco: the ATF agents themselves.

We received unqualified cooperation from the hundreds of line agents we interviewed. They wanted the truth to be told. And to ensure that it was, they not only subjected themselves willingly to protracted and no doubt painful scrutiny, they welcomed it. With-

out their support and their professional commitment to effective law enforcement, a difficult task may have been rendered impossible.

In sum, Mr. Chairman, while the events outside Waco led to a tragedy unequalled in Treasury law enforcement, I believe the effort undertaken to learn from these events demonstrated the exceptional professionalism of Treasury's law enforcement bureaus. The men and woman involved in the Waco inquiry and report should make all of us proud.

We began our first interviews on May 24. Between that date and the conclusion of our investigation, we interviewed more than 500 individuals, including all of the ATF agents involved in Waco on the 28th. We tried to gather every document and item of information. We collected thousands of documents and materials. We collected videotapes and photographs. In short, we pursued and reviewed all material that might have helped us understand what happened on the 28th.

The review found that there was ample justification for investigating David Koresh and his followers and that the investigation was properly and professionally conducted.

Make no mistake, David Koresh and his followers committed numerous felony violations of Federal firearms and explosive laws and he presented a danger to the community. According to our firearms and explosives experts based solely on shipping invoices, let me describe some of the cult's arsenal. Approximately 136 assault rifles, 29 pistols, four shotguns, 786 magazines for firearms and 211,000 rounds of ammunition, sufficient upper and lower receivers to assemble 110 additional AR–15 and M–16 rifles, grenade launcher attachments for the AR–15 and M–16 rifles, sufficient chemicals and components to construct at least 50 grenades and as many as 250. They also had chemicals and components to create 70 pipe bombs.

Koresh was investigated based on the evidence that he was violating Federal firearms and explosive laws, not for his religious beliefs. As you all know, we found that the tactical plan developed to serve the warrant was seriously flawed in several respects. However, four of our tactical experts concluded that the plan could have succeeded had the intelligence on which it was based been accurate. But all six experts identified serious deficiencies in the plan and ultimately challenged the wisdom of conducting a raid under the circumstances presented.

Although we cannot prejudge all future situations, we must be open to the possibility that a dynamic entry as ATF confronted exposing agents and innocent persons and children to gunfire may simply not be an acceptable law enforcement option.

We now know that Koresh was alerted to the raid, based on a warning, albeit unintentional, from a television cameraman to one of Koresh's followers. We also know that on the morning of February 28, in the hours before the raid, there were several vehicles that obviously contained reporters. In addition, a significant number of law enforcement personnel knew of the raid. The possibility that these conditions could lead to the raid being compromised should have been recognized by the raid commanders.

The report details the actions taken and statements made by some ATF field supervisors and national managers after the raid. The report concludes that statements were made to the public and the review team which were less than accurate. Indeed, it is difficult to characterize them as anything other than lies. Moreover, as a policymaker and manager, it is clear to me that their conduct fell far below what can be expected of experienced agents who are responsible for the lives of others.

As you know, the action of several individuals is under review by Treasury's Office of Inspector General at this time. As important as finding out what happened in Waco is ensuring as best we can that similar tragedies do not occur again. I know that is the intention of the committee and that is the intention of the Department of Treasury and the intention of ATF.

We have already taken steps in that direction on hiring and assigning the new acting director of ATF, John Magaw. Director Magaw graciously agreed to leave his position as Director of the Secret Service and contribute his many years of law enforcement experience to strengthening ATF. It took courage for him to leave. We applaud him for it.

The Secretary of Treasury is taking steps now to ensure that his tenure will not be a brief tenure, but a long tenure.

Next, allow me to introduce ATF's new Associate Director for Law Enforcement, Charles Thomson, formerly the Special Agent in charge of ATF's New York office. Mr. Thomson, as Mr. Magaw, graciously agreed to leave his job where he has tremendous security and tremendous respect in New York. And we thank him and applaud him as well for his graciousness.

Apart from bringing a new leadership, the Office of Enforcement has initiated steps to improve its ability to oversee and direct law enforcement bureaus over which it exercises oversight responsibility. These steps are not taken in an effort to assume routine operational control over the bureaus. That simply cannot be done. As we note in the report, such an attempt would be an exercise in futility.

In 1992 alone, ATF's more than 2,000 agents executed 10,134 Federal warrants. In addition, they participated with State and local agencies in the service of 12,884 search warrants nationwide. Given the speed with which most law enforcement activities occur and the degree of familiarity that is needed before an operation can be assessed, involvement by the Office of Enforcement in most ATF raids and similarly those of other law enforcement bureaus would be impossible. The Office of Enforcement possesses neither the expertise nor the capacity for such micromanagement.

The role of the Office of Enforcement should be to ensure that the law enforcement bureaus are executing their missions consistent with the policies, principles, and priorities established by the Department of the Treasury. To accomplish this objective, the Office of Enforcement has established a Treasury Law Enforcement Council comprising the directors of the U.S. Secret Service, ATF, the Federal Law Enforcement Training Center, the Financial Crimes Enforcement Network, the Commissioner of Customs and the Assistant Commissioner for the Criminal Investigative Division of the Internal Revenue Service.

Its purpose is to provide Treasury law enforcement leaders a forum to discuss significant policy or operational matters with one another and with the Assistant Secretary for Enforcement. In conjunction with the council, I have established formal reporting requirements and crisis management procedures for the bureaus.

Second, I have constituted a series of weekly and monthly meetings with bureau heads to ensure that policy level officials are provided with timely information. As you will recall, the Office of Enforcement in the case of Waco didn't find out about the planned raid or the investigation until two days before its launching.

Ultimately, effective oversight and supervision cannot be reduced to a formula or a list of prescriptive actions, duties, and responsibilities. Rather, it must be the product of a working relationship characterized by clear direction, open dialogue, and mutual trust.

Nonetheless, it is not too much to expect of the directors of the bureaus that they recognize when an investigation or operation should be brought to the attention of the Office of Enforcement. Among the factors I expect the bureau heads to consider in determining whether and when to involve my office are the following:

One, whether the operation presents a significant risk to the lives of law enforcement personnel or civilians; two, whether the operation is of a significantly different scope or scale than previous operations undertaken by that bureau; three, the extent to which the operation entails use of novel or untested techniques or technology; four, the extent to which the operation or investigation involves sensitive issues such as religion or politics; five, whether the operation requires a reallocation of bureau funds or otherwise entails extraordinary response.

This list is not intended to be exhaustive or rigid. I also welcome the committee's suggestions or ideas in this regard. The list indicates some issues that should act as a red flag to a bureau head suggesting that the Office of Enforcement should be informed of the operation. Our role would be to ensure that the bureau has tapped all the expertise and knowledge available throughout Federal Government.

For example, in a raid like Waco one would think immediately that such a raid ought not be conducted by the Department of Treasury alone. The Department of Justice ought to be involved in some stage, some shape, some form, some manner.

Ultimately, no rule or policy will guarantee that no more agents will lose their lives enforcing the law. Law enforcement will always be dangerous and at times deadly. Nonetheless, we owe it to those who risk their lives as well as those whose lives may be put at risk to ensure that each operation is thoroughly planned and executed with the utmost regard for safety. I believe that these measures and the ones that Director Magaw will describe will bring us significantly closer to reaching that goal.

Mr. Chairman, members of the committee, in closing I would like to thank the hundreds of people who assisted us in our review, including this committee and your staff. We must learn from the past and our mistakes if we are to improve the future. I hope that our efforts at Treasury since that fateful Sunday in February will contribute to greater safety for our officers and better law enforcement.

Thank you for your support, your patience, and allowing me to speak to you.

Director Magaw has a short statement and we will both be happy to answer any questions you may have, as well as Mr. Thomson. We appreciate that Director Magaw has agreed to handle any questions you might have in his area of expertise. Charles Thomson will benefit the subcommittee with his expertise historically.

[The prepared statement of Ronald K. Noble follows:]

TESTIMONY OF RONALD K. NOBLE

ASSISTANT SECRETARY (ENFORCEMENT) DEPARTMENT OF THE TREASURY

I WOULD LIKE TO THANK THE COMMITTEE AND YOU MR. CHAIRMAN FOR THE SUPPORT AND PATIENCE YOU HAVE EXTENDED TO THE DEPARTMENT OF THE TREASURY WHILE WE CONDUCTED OUR LENGTHY AND SEARCHING REVIEW OF THE EVENTS LEADING UP TO THE ASSAULT ON THE BRANCH DAVIDIAN COMPOUND OUTSIDE WACO TEXAS. AS YOU WILL ALL RECALL, WHEN THE CHAIRMAN FIRST CONVENED HEARINGS BACK IN JUNE OF THIS YEAR, WE WERE CONCERNED ABOUT THE EFFECT HEARINGS MIGHT HAVE ON OUR PENDING INVESTIGATION AS WELL AS THE IMPORTANT CRIMINAL PROSECUTIONS IN WACO. THE CHAIRMAN AND THE COMMITTEE MEMBERS WERE SENSITIVE TO OUR CONCERNS AND DEMONSTRATED A WILLINGNESS TO WORK WITH US COOPERATIVELY TO REACH A SOUND ACCOMMODATION OF THE MANY INTERESTS AND ISSUES PRESENTED BY THE VARIOUS INQUIRIES. I HOPE, AND BELIEVE, THAT THE REPORT WE ISSUED IS WORTHY OF THE CONFIDENCE YOU SHOWED IN OUR ABILITY TO CONDUCT A THOROUGH, FAIR AND IMPARTIAL INVESTIGATION.

THE INVESTIGATION PRODUCED A REPORT THAT IS MORE THAN 500 PAGES LONG. IT REFLECTS THE HARD WORK AND DEDICATION OF MANY INDIVIDUALS. THE DAY TO DAY DIRECTION OF THE INVESTIGATION WAS DIRECTED BY THE PROJECT DIRECTOR, H. GEOFFREY MOULTON, JR., A FORMER FEDERAL PROSECUTOR WHO EARLIER WAS A LAW CLERK FOR CHIEF JUSTICE WILLIAM REHNQUIST. WITH ME HERE TODAY ARE THE TWO ASSISTANT PROJECT DIRECTORS. DAVID DOUGLASS, ALSO A FORMER FEDERAL PROSECUTOR, IS ON LEAVE FROM PRIVATE PRACTICE AT WILEY, REIN & FIELDING HERE IN WASHINGTON. SPECIAL AGENT LEWIS C.

MERLETTI, THE OTHER ASSISTANT PROJECT DIRECTOR, IS PRESENTLY A DEPUTY ASSISTANT DIRECTOR WITH THE SECRET SERVICE. HE HAS BEEN WITH THE SECRET SERVICE FOR OVER 19 YEARS. SPECIAL AGENT MERLETTI COORDINATED THE ACTIVITIES OF THE 16 EXPERIENCED TREASURY INVESTIGATORS ASSIGNED TO THE REVIEW FROM ALL OF OUR LAW ENFORCEMENT BUREAUS EXCEPT, OF COURSE, ATF.

TO ASSURE THE AMERICAN PEOPLE THAT THE REPORT WOULD BE AN UNCOMPROMISING EXAMINATION OF THE EVENTS LEADING UP TO THE TRAGEDY ON FEBRUARY 28, WE REACHED BEYOND THE TREASURY DEPARTMENT. WE CONSULTED 6 NON-TREASURY EXPERTS IN TACTICAL OPERATIONS:

Wade Y. Ishimoto: Retired Delta Force Intelligence Officer. Currently he is Manager, Facilities Customer Representative Department, Sandia National Laboratories.

John A. Kolman: Retired Captain, Los Angeles County Sheriffs Department with extensive experience in tactical operations from a planning and command/control perspective. Currently a consultant, writer, Founder and Director of the National Tactical Officers Association.

George A. Morrison: In his 37th year with the Los Angeles Police Department. Has extensive experience in tactical operations from a planning and command/control perspective. Participant in the Department of State Anti-Terrorism Assistance Program.

John J. Murphy: Commanding Officer in New York Police Department's Special Operation Division.

Rod Paschall: (USA/RET) - Former Commander of 1st Special Forces Group - Delta. Currently a consultant, writer, and associated with the Office of International Criminal Justice, University of Illinois at Chicago.

Robert Sobocienski: Leading line officer in New York Police Department's Special Operations Division.

TO EXAMINE THE ISSUES ARISING FROM KORESH'S STOCKPILE OF WEAPONS,

WE ALSO CALLED UPON TWO EXPERTS IN FIREARMS AND AMMUNITION:

William C. Davis, Jr. - Formerly US Army, Frankfurt, Pa., Arsenal. Registered Professional Engineer with over fifty years of government experience in weapons analysis, design and development. An expert on the M-16. He is currently the owner of Tioga Engineering Company, Wellsboro, Pa.

Charles R. Fagg - Mechanical Engineer with 30 years of government experience in weapons analysis, design and development. Currently, associated with Mr. Davis at Tioga Engineering.

FINALLY, TO REVIEW THE IMPLICATIONS OF SHIPPING INVOICES

DOCUMENTING THE RECEIPT OF EXPLOSIVES MATERIALS AND COMPONENTS WE

UTILIZED THE SERVICES OF TWO EXPERTS IN EXPLOSIVES AND THE

MANUFACTURE OF IMPROVISED EXPLOSIVES DEVICES:

Capt. Joseph Kennedy - (USN/RET) Former commander, US Navy EOD Technology Center, Indian Head, Md.

Paul Cooper - Sandia National Laboratories - expert in explosive materials, conducted investigation on the Battleship New Jersey incident, the Marine barracks bombing in Beirut, and has served as a consultant to numerous government agencies.

THE INVESTIGATION AND REPORT WERE GUIDED BY THREE INDEPENDENT

REVIEWERS OF NATIONAL PROMINENCE AND UNQUESTIONED INTEGRITY.

EDWIN O. GUTHMAN, A PULITZER PRIZE WINNING JOURNALIST AND FORMER EDITOR OF THE PHILADELPHIA INQUIRER AND NATIONAL EDITOR OF THE LOS ANGELES TIMES. HE WAS ALSO FORMERLY PRESS SECRETARY TO ATTORNEY GENERAL AND LATER SENATOR ROBERT F. KENNEDY.

HENRY S. RUTH, JR. - A LONGTIME JUSTICE OFFICIAL AND FORMER WATERGATE PROSECUTOR. MR. RUTH ALSO SERVED ON THE COMMISSION TO REVIEW LAW ENFORCEMENT'S HANDLING OF THE MOVE CRISIS.

WILLIE L. WILLIAMS - CHIEF OF THE LOS ANGELES POLICE DEPARTMENT. RECIPIENT OF NUMEROUS AWARDS AND CITATIONS, HE IS ALREADY CREDITED WITH SIGNIFICANT IMPROVEMENTS IN POLICE AND COMMUNITY RELATIONS IN THE CITY OF LOS ANGELES.

EACH OF THE INDEPENDENT REVIEWERS HAS PROVIDED TO SECRETARY BENTSEN A LETTER ASSURING THE SECRETARY THAT THE REVIEW WAS THOROUGH, FAIR AND IMPARTIAL. WITH YOUR PERMISSION MR. CHAIRMAN, AT THE CONCLUSION OF MY REMARKS I WOULD LIKE TO MAKE THOSE LETTERS PART OF THE RECORD OF THESE PROCEEDINGS.

IN ADDITION MR. CHAIRMAN, THE OFFICE OF THE INSPECTOR GENERAL FOR THE DEPARTMENT OF THE TREASURY MONITORED THE INVESTIGATION TO ENSURE THAT A REASONABLE INVESTIGATIVE PLAN WAS FORMULATED, THAT IT WAS PROPERLY IMPLEMENTED, THAT ALL REASONABLE LEADS WERE PURSUED AND THAT THE FINAL REPORT ADEQUATELY ADDRESSED THE MATERIAL ISSUES. WITH YOUR PERMISSION, I WOULD ALSO LIKE TO MAKE THAT OPINION PART OF THE RECORD.

ALL OF THE EXPERTS AND INDEPENDENT REVIEWERS SERVED WITHOUT PAY AND PUT IN MANY LONG HOURS REVIEWING REPORTS, VIEWING VIDEOTAPES, MEETING WITH THE INVESTIGATIVE TEAM AND ATF AGENTS. THEY BROUGHT UNMATCHED EXPERIENCE AND PROVIDED INVALUABLE INSIGHT. THE VALUE OF THEIR CONTRIBUTION TO THIS PROJECT AND THE DEPTH OF OUR APPRECIATION FOR THEIR GUIDANCE AND GENEROSITY CANNOT BE OVERSTATED.

I WOULD BE REMISS IN NOT MENTIONING ONE FINAL GROUP WITHOUT WHOM WE COULD NOT HAVE CARRIED OUT THE MANDATE OF PRESIDENT CLINTON TO CONDUCT A "VIGOROUS AND THOROUGH" REVIEW OF THE EVENTS IN WACO--THE ATF AGENTS. WE RECEIVED UNQUALIFIED COOPERATION FROM THE HUNDREDS OF LINE AGENTS WE INTERVIEWED. THEY WANTED THE TRUTH TO BE TOLD. AND TO ENSURE THAT IT WAS, THEY NOT ONLY SUBJECTED THEMSELVES WILLINGLY TO PROTRACTED AND NO DOUBT PAINFUL SCRUTINY--THEY WELCOMED IT. WITHOUT THEIR SUPPORT OF OUR EFFORTS AND THEIR PROFESSIONAL COMMITMENT TO EFFECTIVE LAW ENFORCEMENT, A DIFFICULT TASK MAY HAVE BEEN RENDERED IMPOSSIBLE. IN SUM, MR. CHAIRMAN, WHILE THE EVENTS OUTSIDE WACO LED TO A TRAGEDY UNEQUALLED IN TREASURY LAW ENFORCEMENT, I BELIEVE THE EFFORT

UNDERTAKEN TO LEARN FROM THESE EVENTS DEMONSTRATED THE EXCEPTIONAL PROFESSIONALISM OF TREASURY'S LAW ENFORCEMENT BUREAUS. THE MEN AND WOMEN INVOLVED IN THE WACO INQUIRY AND REPORT SHOULD MAKE ALL OF US PROUD.

I KNOW THAT YOU HAVE ALL RECEIVED COPIES OF THE REPORT. IN MY TESTIMONY TODAY I DO NOT INTEND TO PROVIDE YOU A DETAILED RESTATEMENT OF ITS FINDINGS. INSTEAD, I PROPOSE TO BRIEFLY DESCRIBE FOR YOU OUR INVESTIGATIVE METHODOLOGY AND THEN DISCUSS SOME OF THE MOST CRITICAL FINDINGS. THEN I PROPOSE TO TURN TO THOSE STEPS WE HAVE UNDERTAKEN, AND WILL CONTINUE TO UNDERTAKE, TO PREVENT SUCH A TRAGEDY FROM RECURRING.

METHODOLOGY

WE BEGAN OUR FIRST INTERVIEWS ON MAY 24. BETWEEN THAT DATE AND THE CONCLUSION OF OUR INVESTIGATION WE INTERVIEWED MORE THAN 500 INDIVIDUALS. MANY OF THE INTERVIEWS LASTED SEVERAL HOURS, SOME TOOK PLACE OVER SEVERAL DAYS. AS FACTS CHANGED, INDIVIDUALS WERE RE-INTERVIEWED.

WE FIRST INTERVIEWED ATF AGENTS WHO HAD BEEN INVOLVED IN THE RAID ON THE 28TH. AS YOU MAY RECALL, AND AS WE RECOUNT IN THE REPORT, WITHIN DAYS AFTER THE RAID ACCOUNTS BEGAN TO SURFACE THAT THE 'OFFICIAL' ATF ACCOUNT OF EVENTS WAS NOT ACCURATE. ALTHOUGH BACK IN MAY WE DID NOT KNOW WHERE THE ANSWERS LAY, WE KNEW THAT THE PEOPLE WITH THE FIRST HAND KNOWLEDGE OF WHAT HAD HAPPENED WERE

THE AGENTS THAT PARTICIPATED IN THE RAID, SO WE STARTED WITH THEM AND WORKED OUR WAY UP THE 'CHAIN OF COMMAND'.

BECAUSE THE MAJORITY OF THE AGENTS HAD BEEN INVOLVED DIRECTLY IN THE FIREFIGHT ON THE 28TH, BEFORE WE CONDUCTED THE FIRST INTERVIEW WE CONSULTED PEER SUPPORT COUNSELORS--SOME OF WHOM HAD PROVIDED COUNSELING TO THE AGENTS IN WACO. BY MEETING WITH THESE INDIVIDUALS THE REVIEW TEAM BECAME EDUCATED AND SENSITIZED TO THE EMOTIONS AND REACTIONS THEY MIGHT ENCOUNTER IN THEIR INTERVIEWS. I CAN TELL YOU THAT MANY OF THE INTERVIEWS WERE HIGHLY EMOTIONAL. THERE WAS ANGER AND THERE WERE TEARS. WE WERE ASKING PEOPLE TO RELIVE EVENTS THAT RESULTED IN THE DEATHS OF THEIR FRIENDS AND IN SOME INSTANCES INJURIES TO THEMSELVES. I VIVIDLY RECALL ONE AGENT'S TEARS AS HE DESCRIBED KENNY KING REPEATEDLY CALLING FOR HELP WHILE HE LAY BLEEDING, TRAPPED IN A COURTYARD BEHIND THE COMPOUND. THE INTERVIEWS WERE DIFFICULT BUT NECESSARY.

WE ALSO INTERVIEWED FBI AGENTS WHO HAD A ROLE IN THE TRANSFER OF AUTHORITY FROM ATF TO THE FBI, CIVILIANS IN WACO, FORMER CULT MEMBERS, THE FAMILIES OF CULT MEMBERS, AND OTHERS. WE ATTEMPTED TO INTERVIEW ANYONE WHO HAD SOME ROLE IN ATF'S INVESTIGATION OR THE RAID. DUE TO THE PENDING CRIMINAL PROSECUTIONS, WE DID NOT INTERVIEW CERTAIN INDIVIDUALS. NO ONE HOWEVER, REFUSED A REQUEST TO BE INTERVIEWED. REPORTS WERE PREPARED OF ALL INTERVIEWS.

IN ADDITION TO INTERVIEWING INDIVIDUALS, WE TRIED TO GATHER EVERY DOCUMENT AND ITEM OF RECORDED INFORMATION RELEVANT TO THE

INVESTIGATION. WE COLLECTED THOUSANDS OF DOCUMENTS AND MATERIALS. WE ALSO COLLECTED VIDEOTAPES AND PHOTOGRAPHS. IN SHORT, WE PURSUED AND REVIEWED ALL MATERIAL THAT MIGHT HAVE HELPED US TO UNDERSTAND WHAT HAPPENED ON THE 28TH.

FINALLY, WE ESTABLISHED AN 800 NUMBER THAT WE DISTRIBUTED TO ATF OFFICES SO THAT AGENTS WOULD HAVE A READY WAY TO CONTACT THE REVIEW IN THE EVENT THAT THEY OBTAINED NEW INFORMATION, OR HAD QUESTIONS OR CONCERNS AT ANY STAGE OF THE INVESTIGATION. THROUGH THIS NUMBER ANY AGENT COULD ANONYMOUSLY PROVIDE INFORMATION HE OR SHE MAY HAVE BEEN RELUCTANT TO HAVE ATTRIBUTED TO HIM OR HER.

CRITICAL FINDINGS

LET ME NOW TURN TO SOME OF THE MORE CRITICAL FINDINGS, THOSE CONCERNING THE DECISION TO INVESTIGATE KORESH, THE PLAN DEVELOPED BY ATF FOR SERVING THE WARRANTS, HOW THE ELEMENT OF SURPRISE WAS LOST AND THE ACTIONS OF ATF MANAGEMENT AFTER THE RAID.

INVESTIGATION OF KORESH

THE REVIEW FOUND THAT THERE WAS AMPLE JUSTIFICATION FOR INVESTIGATING DAVID KORESH AND HIS FOLLOWERS AND THAT THE INVESTIGATION WAS PROPERLY AND PROFESSIONALLY CONDUCTED. MAKE NO MISTAKE: DAVID KORESH HAD COMMITTED NUMEROUS FELONY VIOLATIONS OF FEDERAL FIREARMS AND EXPLOSIVES LAWS AND HE PRESENTED A DANGER TO THE COMMUNITY. BEFORE THE RAID, THE INVESTIGATION REVEALED THAT DAVID KORESH HAD RECEIVED EXPLOSIVES, ASSAULT RIFLES AND AMMUNITION. HE ALSO HAD THE MEANS AND MATERIAL TO CONVERT THOSE

ASSAULT RIFLES TO ILLEGAL AUTOMATIC WEAPONS--WEAPONS THAT WERE USED AGAINST ATF AGENTS ON FEBRUARY 28.

ACCORDING TO OUR FIREARMS AND EXPLOSIVES EXPERTS, BASED SOLELY ON SHIPPING INVOICES, LET ME DESCRIBE JUST SOME OF THE CULT'S ARSENAL:

1. APPROXIMATELY 136 ASSAULT RIFLES, 29 PISTOLS, 4 SHOTGUNS, 786 MAGAZINES FOR FIREARMS AND 211,000 ROUNDS OF AMMUNITION;

2. SUFFICIENT UPPER AND LOWER RECEIVERS TO ASSEMBLE AN ADDITIONAL 110 AR-15/M16 RIFLES.

3. GRENADE LAUNCHER ATTACHMENTS FOR THE AR-15/M16 RIFLES.

4. SUFFICIENT CHEMICALS AND COMPONENTS TO CONSTRUCT AT LEAST 50 GRENADES AND PERHAPS AS MANY AS 250. THEY ALSO HAD CHEMICALS AND COMPONENTS TO CREATE 70 PIPE BOMBS.

KORESH WAS INVESTIGATED BASED ON THE EVIDENCE THAT HE WAS VIOLATING FEDERAL FIREARMS AND EXPLOSIVES LAWS. HE WAS NOT INVESTIGATED FOR HIS RELIGIOUS BELIEFS. THOSE RELIGIOUS BELIEFS HOWEVER SHOULD NOT HAVE BEEN--AND WERE NOT-- ALLOWED TO SHIELD HIM FROM COMPLYING WITH FEDERAL LAW.

IN LATE APRIL, AFTER THE FIRE THAT DESTROYED THE COMPOUND, ATF FIREARMS AND EXPLOSIVES EXPERTS COLLECTED EVIDENCE OF THE FIREARMS AND OTHER DESTRUCTIVE DEVICES KORESH AND HIS FOLLOWERS HAD POSSESSED. BASED ON THE MATERIALS RECOVERED, THE EXPERTS CONCLUDED THAT KORESH AND HIS FOLLOWERS POSSESSED 57 PISTOLS, 6 REVOLVERS, 12 SHOTGUNS, 101 RIFLES, MORE THAN 44 MACHINEGUNS, MORE THAN 16 SILENCERS, 6 FLARE LAUNCHERS, 3 LIVE GRENADES PLUS NUMEROUS COMPONENTS, AND APPROXIMATELY 200,000 UNUSED ROUNDS OF

AMMUNITION. FBI EXPERTS ARE STILL ANALYZING THE EVIDENCE FOUND AT THE COMPOUND TO DETERMINE MORE PRECISELY THE WEAPONRY ACCUMULATED BY KORESH AND HIS FOLLOWERS. BECAUSE OF THE FIRE, THIS PROCESS HAS BEEN TIME-CONSUMING AND THE EXPERTS HAVE BEEN UNABLE TO DETERMINE WITH ANY CERTAINTY THE AMOUNT OF EXPLOSIVE MATERIALS THAT HAD BEEN STORED AT THE COMPOUND.

THE TACTICAL PLAN

AS YOU ALL NOW KNOW, WE FOUND THAT THE TACTICAL PLAN DEVELOPED TO SERVE THE WARRANTS WAS SERIOUSLY FLAWED IN SEVERAL RESPECTS. HOWEVER, FOUR OF OUR TACTICAL EXPERTS CONCLUDED THAT THE PLAN COULD HAVE SUCCEEDED HAD THE INTELLIGENCE ON WHICH IT WAS BASED BEEN ACCURATE. BUT ALL SIX EXPERTS IDENTIFIED SERIOUS DEFICIENCIES IN THE PLAN AND ULTIMATELY CHALLENGED THE WISDOM OF CONDUCTING A RAID UNDER THE CIRCUMSTANCES PRESENTED. ALTHOUGH WE CANNOT PREJUDGE ALL FUTURE SITUATIONS, WE MUST BE OPEN TO THE POSSIBILITY THAT A DYNAMIC ENTRY AS ATF CONFRONTED EXPOSING AGENTS, INNOCENT PERSONS AND CHILDREN TO GUNFIRE, MAY SIMPLY NOT BE AN ACCEPTABLE LAW ENFORCEMENT OPTION.

LOSS OF THE ELEMENT OF SURPRISE

WE NOW KNOW THAT KORESH WAS ALERTED TO THE RAID BASED ON A WARNING--ALBEIT UNINTENTIONAL--FROM A TELEVISION CAMERAMAN TO ONE OF KORESH'S FOLLOWERS. WE ALSO KNOW THAT ON THE MORNING OF FEBRUARY 28, IN THE HOURS BEFORE THE RAID, THERE WERE SEVERAL VEHICLES THAT OBVIOUSLY CONTAINED REPORTERS. IN ADDITION, A

SIGNIFICANT NUMBER OF NON-LAW ENFORCEMENT PERSONNEL KNEW OF THE RAID. THE POSSIBILITY THAT THESE CONDITIONS COULD LEAD TO THE RAID BEING COMPROMISED SHOULD HAVE BEEN RECOGNIZED BY THE RAID COMMANDERS. RESPONSIBILITY FOR THE FAILURE TO TAKE ADEQUATE PRECAUTIONS AGAINST THE RAID BEING COMPROMISED, AND THE SUBSEQUENT FAILURE TO APPRECIATE THE IMPLICATIONS OF THE WARNING PASSED TO KORESH MUST BE ASSIGNED TO ATF'S LEADERSHIP

POST-RAID CONDUCT

THE REPORT DETAILS THE ACTIONS TAKEN AND STATEMENTS MADE BY SOME ATF FIELD SUPERVISORS AND NATIONAL MANAGERS AFTER THE RAID. THE REPORT CONCLUDES THAT STATEMENTS WERE MADE TO THE PUBLIC AND THE REVIEW TEAM WHICH WERE LESS THAN ACCURATE. INDEED, IT IS DIFFICULT TO CHARACTERIZE THEM AS ANYTHING OTHER THAN LIES. MOREOVER, AS A POLICY MAKER AND MANAGER, IT IS CLEAR TO ME THAT THEIR CONDUCT FELL FAR BELOW WHAT CAN BE ACCEPTED OF EXPERIENCED AGENTS WHO ARE RESPONSIBLE FOR THE LIVES OF OTHERS. AS YOU KNOW, THE ACTIONS OF SEVERAL INDIVIDUALS ARE UNDER REVIEW BY TREASURY'S OFFICE OF INSPECTOR GENERAL.

REMEDIES

AS IMPORTANT AS FINDING OUT WHAT HAPPENED IN WACO AND WHY, IS ENSURING AS BEST WE CAN THAT SIMILAR TRAGEDIES DO NOT OCCUR AGAIN. WE HAVE ALREADY TAKEN SOME STEPS IN THAT DIRECTION, AND ON THAT NOTE ALLOW ME TO INTRODUCE TO YOU THE NEW ACTING DIRECTOR OF ATF JOHN MAGAW. DIRECTOR MAGAW GRACIOUSLY AGREED TO LEAVE HIS

POSITION AS DIRECTOR OF THE SECRET SERVICE AND CONTRIBUTE HIS MANY YEARS OF LAW ENFORCEMENT EXPERIENCE TO STRENGTHENING ATF.

NEXT ALLOW ME TO INTRODUCE ATF'S NEW ASSOCIATE DIRECTOR FOR LAW ENFORCEMENT, CHARLES THOMSON, FORMERLY THE SPECIAL AGENT IN CHARGE OF ATF'S NEW YORK OFFICE.

APART FROM BRINGING IN NEW LEADERSHIP, THE OFFICE OF ENFORCEMENT HAS INITIATED STEPS TO IMPROVE ITS ABILITY TO OVERSEE AND DIRECT THE LAW ENFORCEMENT BUREAUS OVER WHICH IT EXERCISES OVERSIGHT RESPONSIBILITY. THESE STEPS ARE NOT TAKEN IN AN EFFORT TO ASSUME ROUTINE OPERATIONAL CONTROL OVER THE BUREAUS. AS WE NOTE IN THE REPORT, SUCH AN ATTEMPT WOULD BE AN EXERCISE IN FUTILITY. IN 1992 ALONE, ATF'S MORE THAN 2,000 AGENTS EXECUTED 10,134 FEDERAL WARRANTS. IN ADDITION, THEY PARTICIPATED WITH STATE AND LOCAL AGENCIES IN THE SERVICE OF 12,884 SEARCH WARRANTS NATIONWIDE. GIVEN THE SPEED WITH WHICH MOST ENFORCEMENT ACTIVITIES OCCUR AND THE DEGREE OF FAMILIARITY THAT IS NEEDED BEFORE AN OPERATION CAN BE ASSESSED, INVOLVEMENT BY THE OFFICE OF ENFORCEMENT IN MOST ATF RAIDS, AND SIMILARLY IN THOSE OF THE OTHER LAW ENFORCEMENT BUREAUS, WOULD BE IMPOSSIBLE. THE OFFICE OF ENFORCEMENT POSSESSES NEITHER THE EXPERTISE NOR THE CAPACITY FOR SUCH MICRO-MANAGEMENT.

THE ROLE OF THE OFFICE OF ENFORCEMENT SHOULD BE TO ENSURE THAT THE LAW ENFORCEMENT BUREAUS ARE EXECUTING THEIR MISSIONS CONSISTENT WITH THE POLICIES, PRINCIPLES AND PRIORITIES

ESTABLISHED BY THE DEPARTMENT OF THE TREASURY. TO ACCOMPLISH THIS OBJECTIVE, THE OFFICE OF ENFORCEMENT HAS ESTABLISHED A TREASURY LAW ENFORCEMENT COUNCIL COMPRISING THE DIRECTORS OF THE U.S. SECRET SERVICE, ATF, THE FEDERAL LAW ENFORCEMENT TRAINING CENTER, THE FINANCIAL CRIMES ENFORCEMENT NETWORK, THE COMMISSIONER OF CUSTOMS AND THE ASSISTANT COMMISSIONER FOR THE CRIMINAL INVESTIGATIVE DIVISION OF THE INTERNAL REVENUE SERVICE. ITS PURPOSE IS TO PROVIDE TREASURY LAW ENFORCEMENT LEADERS A FORUM TO DISCUSS SIGNIFICANT POLICY OR OPERATIONAL MATTERS WITH ONE ANOTHER AND WITH THE ASSISTANT SECRETARY FOR ENFORCEMENT. IN CONJUNCTION WITH THE COUNCIL, I HAVE ESTABLISHED FORMAL REPORTING REQUIREMENTS AND CRISIS MANAGEMENT PROCEDURES FOR THE BUREAUS.

SECOND, I HAVE INSTITUTED A SERIES OF WEEKLY AND MONTHLY MEETINGS WITH BUREAU HEADS TO ENSURE THAT POLICY-LEVEL OFFICIALS ARE PROVIDED WITH TIMELY INFORMATION.

ULTIMATELY, EFFECTIVE OVERSIGHT AND SUPERVISION CANNOT BE REDUCED TO A FORMULA OR A LIST OF PRESCRIPTIVE ACTIONS, DUTIES AND RESPONSIBILITIES. RATHER, IT MUST BE THE PRODUCT OF A WORKING RELATIONSHIP CHARACTERIZED BY CLEAR DIRECTION, OPEN DIALOGUE AND MUTUAL TRUST. NONETHELESS, IT IS NOT TOO MUCH TO EXPECT OF THE DIRECTORS OF THE BUREAUS THAT THEY RECOGNIZE WHEN AN INVESTIGATION OR OPERATION SHOULD BE BROUGHT TO THE ATTENTION OF THE OFFICE OF ENFORCEMENT. AMONG THE FACTORS I EXPECT THE BUREAU HEADS TO CONSIDER IN DETERMINING WHETHER AND WHEN TO INVOLVE MY OFFICE ARE THE FOLLOWING:

1. WHETHER THE OPERATION PRESENTS A SIGNIFICANT RISK TO THE LIVES OF LAW ENFORCEMENT PERSONNEL OR CIVILIANS.

2. WHETHER THE OPERATION IS OF A SIGNIFICANTLY DIFFERENT SCOPE OR SCALE THAN PREVIOUS OPERATIONS UNDERTAKEN BY THAT BUREAU.

3. THE EXTENT TO WHICH THE OPERATION ENTAILS USE OF NOVEL OR UNTESTED TECHNIQUES OR TECHNOLOGY.

4. THE EXTENT TO WHICH THE OPERATION OR INVESTIGATION INVOLVES SENSITIVE ISSUES SUCH AS RELIGION OR POLITICS.

5. WHETHER THE OPERATION REQUIRES A RE-ALLOCATION OF BUREAU FUNDS OR OTHERWISE ENTAILS EXTRAORDINARY EXPENSES.

THIS LIST IS NOT INTENDED TO BE EXHAUSTIVE OR RIGID. RATHER IT INDICATES SOME ISSUES THAT SHOULD ACT AS A RED FLAG TO A BUREAU HEAD, SUGGESTING THAT THE OFFICE OF ENFORCEMENT SHOULD BE INFORMED OF THE OPERATION. OUR ROLE WOULD THEN BE TO ENSURE THAT THE BUREAU HAD TAPPED ALL OF THE EXPERTISE, INTELLIGENCE AND KNOWLEDGE AVAILABLE THROUGHOUT THE FEDERAL GOVERNMENT.

ULTIMATELY NO RULE OR POLICY WILL GUARANTEE THAT NO MORE AGENTS WILL LOSE THEIR LIVES ENFORCING THE LAW. LAW ENFORCEMENT WILL ALWAYS BE DANGEROUS AND AT TIMES DEADLY. NONETHELESS, WE OWE IT TO THOSE WHO RISK THEIR LIVES, AS WELL AS THOSE WHOSE LIVES MAY BE PUT AT RISK, TO ENSURE THAT EACH OPERATION IS THOROUGHLY PLANNED AND EXECUTED WITH THE UTMOST REGARD FOR SAFETY. I BELIEVE THAT THESE MEASURES, AND THE ONES THAT DIRECTOR MAGAW WILL DESCRIBE WILL BRING US SIGNIFICANTLY CLOSER TO REACHING THAT GOAL.

MR. CHAIRMAN, IN CLOSING, I WOULD LIKE TO THANK THE HUNDREDS OF PEOPLE WHO ASSISTED US IN OUR REVIEW INCLUDING THIS COMMITTEE AND YOUR STAFF. WE MUST LEARN FROM THE PAST AND OUR MISTAKES IF

WE ARE TO IMPROVE THE FUTURE. I HOPE THAT OUR EFFORTS AT TREASURY SINCE THAT FATEFUL SUNDAY IN FEBRUARY WILL CONTRIBUTE TO GREATER SAFETY FOR OUR OFFICERS AND BETTER LAW ENFORCEMENT. AGAIN, THANK YOU FOR YOUR SUPPORT AND FOR ALLOWING ME TO SPEAK TO YOU TODAY. I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Statement of Acting Director Magaw, ATF

Mr. Magaw. Mr. Chairman, Members of the subcommittee, while this is not my first opportunity to appear before this subcommittee, it certainly is my first opportunity as Acting Director of ATF, and I welcome that opportunity.

In this new role, one of my immediate tasks is to ensure that the lessons of Waco are learned and that positive and effective changes are implemented. In that effort, I look forward to working with this committee very closely.

The tragedy of February 28th was a bitter blow to ATF, an agency that rightfully prides itself on successfully tackling some of the most difficult, challenging and dangerous activities in all of law enforcement. It was a blow made more agonizing by the erroneous reports and the recognition by ATF rank and file that public statements by Bureau officials were inaccurate.

However, it was not a blow sufficient to damage the core of integrity and professionalism that is the hallmark of the men and women of ATF. It is that core that shows in their full cooperation, which resulted in this Treasury review. Indeed, the men and women of ATF deserve a good measure of credit for the truth becoming known. They came forward and said: Wait a minute, that is not the way it happened.

The report produced by the Treasury review is unparalleled in American law enforcement. It is a product of investigation and review conducted entirely outside the Bureau, but sought by the Bureau being reviewed. And I, too, would like to congratulate the men and women of that review team for the outstanding investigative job that they did in the report writing.

If the report is unremitting in its criticism, it is actually unstinting in its praise for the heroism of the men and women who endured the most savage gun battle in American law enforcement history. The review makes crystal clear that the Branch Davidian raid was a seminal event. It was a crucible in which levels of preparations, skills and judgments that had been successful in numerous situations were not so in this operation.

ATF ADDRESSES FAILURES

It is the task of ATF to work through and learn from these failures. We are committed to doing so openly, in full consultation with our fellow law enforcement agencies at all levels of government, so that all of law enforcement may learn the lessons of this tragic event.

Errors were made by individuals both before and after the fire fight on February 28th. It doesn't diminish the importance of those errors to note that we have a system of investigation and accountability to properly address them. What we need are systems to reduce the likelihood of error.

I do not propose to tell you that I have all the answers. What I can tell you is how we plan to go about obtaining them.

AREAS OF CHANGE

We are carefully breaking down the review line by line, looking at positive and negative findings in each of the functional areas.

Where there is a negative that we can address immediately, we are doing so. Among these are reevaluating the guidelines for the implementation of our special response teams.

While I am a proponent of special response teams, we need to look at these guidelines, and conduct expanded training for the special response teams. The extended course includes one large-scale and several small-scale tactical problems with a requirement for contingency for every phase of the raid plan as well as an integration of the hostage negotiation capabilities.

Another item would be integrating forward observer training with the special response teams, emphasizing the intelligence gathering and security role of the forward observers.

Where there is a negative that we cannot address immediately, we are working to develop a response. Among these are improving both the quality and security of medical support provided to our operations. This involves improving our EMT capability in-house and working with available military and local medical support as a long-range goal, examining available training and models for improving command post organization and information and communications flow, and expanding and refining crisis management training.

As a component of this, we are examining the media relations crisis planning of major public and private organizations, and developing legislative recommendations to address those unique situations where the use of Title III interceptions is necessary in high-risk situations to ensure the safety of agents and suspects rather than to gather evidence.

In these areas, and in numerous others, I can assure you of three things. The first is that we will undertake them openly with no foolish prejudice that someone else cannot help. The second is we will undertake them with participation at all levels of the Bureau. Our experience is a hard one and it is not solely vested in the higher ranks within the Bureau of ATF.

SHARING LESSONS WITH LAW ENFORCEMENT COMMUNITY

The third is that we will share what we have done that failed and what we have done to correct that failure with the American law enforcement community.

The raid on the Branch Davidian complex may be a unique event, however, we are aware of similar groups and situations in other places in this country. The key is to work in concert with our peers to ensure that we are absolutely ready for something like this should it occur again. If we are ready for that, even if it never comes, we are better prepared for the lesser events that will surely occur.

Mr. Chairman, I suggest that it is time to put the events of Waco behind us and move forward, keeping the lessons learned in front of us in clear view as we plan and develop and grow. Before going forward, however, I one more time respectfully remember the four special agents who lost their lives Sunday, February 28, 1993: Conway C. LeBleu, Todd W. McKeehan, Robert J. Williams, and Steven D. Willis.

Mr. Chairman, that concludes my statement.

[The prepared statement of John W. Magaw follows:]

Testimony of

John W. Magaw

Acting Director

Bureau of Alcohol, Tobacco and Firearms

Before

The Subcommittee on

Treasury, Postal Service and General Government

United States House of Representatives

October 22, 1993

Mr. Chairman, members of the subcommittee:

I welcome this opportunity to appear before you. While this is not my first time testifying before this subcommittee; it is my first time as ATF's Acting Director.

In that new role, one of my immediate tasks is to ensure that the lessons of Waco are learned and that positive and effective changes are implemented. In that effort, I look forward to working with this subcommittee.

The tragedy of February 28th was a bitter blow to ATF, an agency that rightfully prides itself on successfully tackling some of the most difficult and dangerous challenges in American law enforcement. It was a blow

made more agonizing by erroneous reports and the recognition by ATF rank and file that public statements by bureau officials were inaccurate.

However, it was not a blow sufficient to damage the core of integrity and professionalism that is the hallmark of the men and women of ATF. It is that core that shows in their full cooperation with the Treasury review team. Indeed, the men and women of ATF deserve a good measure of credit for the truth becoming known. They came forward and said: Wait a minute - that's not the way it happened.

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Errors were made by individuals both before and after the firefight on February 28th. It does not diminish the importance of those errors to note that we have a system of investigation and accountability to properly address them. What we need are systems to reduce the likelihood of error.

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We are carefully breaking down the review report into positive and negative findings in each functional area.

Where there is a negative that we can address immediately, we are doing so.

Among these we are:

1) Reevaluating the guidelines for the implementation our Special Response Teams.

2) Conducting expanded training for the Special Response Teams. The extended course includes one large scale and several small scale tactical problems with a requirement for contingency planning for every phase of the raid plan as well as integration of hostage negotiation capabilities.

*Integrating Forward Observer training with the Special Response Teams, emphasizing the intelligence gathering and security role of the forward observers.

Where there is a negative that we cannot address immediately, we are working to develop a response.

Among these are:

* Improving both the quality and security of medical support provided to our operations. This involves improving our EMT capability in-house and working with available military support as a long range goal.

* Examining available training and models for improving command post organization and information flow.

* Expanding and refining crisis management training. As a component of this, we are examining the media relations crisis planning of major public and private organizations.

* Developing legislative recommendations to address those unique situations where the use of Title III interceptions is necessary in high risk situations to ensure the safety of agents and suspects rather than to gather evidence.

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The raid on the Branch Davidians complex may be a unique event, however, we are aware of similar groups and situations in other places. The key is to work in concert with our peers to ensure we are absolutely ready for something like this should it occur again. If we are ready for that, even if it never comes, we are better prepared for the lesser events that will surely occur.

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Conway C. LeBleu

Todd W. McKeehan

Robert J. Williams

Steven D. Willis

I will be happy to answer your questions.

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Mr. HOYER. Thank you, Director Magaw. And I just had the list put in front of me of those four agents that lost their lives. One of the tragedies is that there are some activities in life which don't allow for mistakes. And, of course, this is one of those areas where mistakes are very costly.

And it is appropriate that we remember that these four young men made no mistakes. They were caught in a situation that I think the report clearly evidences resulted from mistaken judgments. Very frankly, I think in our hearing that we initially had brought that out.

And even though we didn't go into great depth of subsequent events on the 28th, I frankly think that one of things that I was struck with was that this report—and I think it is an excellent, in-depth, no-holds-barred, candid, appropriate report—essentially reflects the findings that came out of our hearing, which of course came from testimony given by the officials involved.

And although they made the judgments that they made, the facts that they adduced at that hearing officially reflected the conclusions of this report. Now, let me ask a few questions.

REACTION TO REPORT

The report—which is both detailed and a comprehensive review. Mr. Higgins apparently indicated that he differed with some of the findings of this report. Let me ask you about your opinion with respect to this review and are there items on which you have differences?

Mr. NOBLE. As the author of the report, that reflects my view after having reviewed all the evidence, met with all the agents, and interviewed some of the ATF officials and other witnesses myself. That is my view, 100 percent, without exception of what happened.

Steven Higgins made his comments prior to having received the report, based in large part of his view of the information he believed may be in the report. Steven is a fine person, as I have indicated. He is someone that the Director will be consulting with.

There isn't anybody that can't help me in terms of learning about Waco. I agree with everything in the report 100 percent. Steve and I have not discussed what is in the report that he disagrees with, as his comments were made prior to seeing the report.

Mr. HOYER. I was not sure from the newspaper reports whether or not he had had the opportunity to see the report.

Mr. NOBLE. He had not, sir.

Mr. HOYER. I have not talked to Director Higgins since then. Are you aware—I presume he has now seen this and you may not want to speak for this unless he has told you specifically. Are there items on which, as director at the time of the occurrence, on which he disagrees to your knowledge?

Mr. NOBLE. The only thing I can say, sir, is that he was aware that there were some actions taken by people whom he had known for a number of years that would require, in my view, the taking of personnel actions against those individuals. And it is my belief, though he didn't articulate this specifically, that in part he did not believe that he could take the personnel action against those people, perhaps, and remain director of ATF during that time period. This is part speculation and part trying to deduce from circumstan-

tial evidence, but he has not told me of any item in the report with which he disagrees.

MOST DISAPPOINTING ERROR

Mr. HOYER. We have the luxury of hindsight. What facts do you find most disappointing about the action taken by ATF either prior to or subsequent to the raid? I have read the report, but I think I would like to hear your analysis of it.

Mr. NOBLE. What I would like to focus on and what is most disappointing, is the action of the supervisors following the raid. Now, you know from the amount of press coverage and equally here in Washington, the intensity of the scrutiny that the failed raid received. You can imagine what it was like near Waco following the tragedy, the number of inquiries that were received of ATF in Washington and ATF officials near Waco.

There was a point in time when it became clear to ATF that there was some dispute within ATF as to whether or not the element of surprise had been lost prior to the raid going forward. At that point, the organization could have done one of two things: either corrected the early statements of the agency that the raid had gone forward without any knowledge that the element of surprise was lost or might have been lost, or it could simply have said we have gotten new information, which puts into question previous statements concerning whether or not the element of surprise was lost at the time the raid commander said the raid is going forward.

A couple of supervisors decided not to candidly and openly state what they knew prior to authorizing the raid to go forward. The agents, on the other hand, believed that this information ought to come out. When the public reports reflected a view of ATF that the element of surprise was not knowingly lost, the agents and others came forward and said: That is not what happened, we knew the element of surprise was lost.

What saddens or disappoints me about the findings of the report are the supervisors who made a bad judgment, and while I can't imagine what it would be like to have said go forward when my colleagues were killed and others were wounded as a result, I know that telling the truth is the only way to learn from it. I wish that they hadn't indirectly pointed the finger at the undercover agent. I wish they had simply been candid.

The other aspects of it, sir, I would not like to say it was disappointing. There were things that I wish had been done differently, but when you look at an organization's history, and ATF had conducted thousands of raids either alone or with other State and locals, they had never had a tragedy approaching this.

They had only had one discharge of weapon. The special response team—what happens is, with success comes this feeling of confidence that you have done it one way before and you can do it the same way the next time. There were a number of flags—caution flags or red flags—that should have been identified prior to the go-ahead sign being given by the raid planners.

And I wish that those flags had been recognized and planned for, because, if so, there were checks in the flawed plans which would have prevented the raid from going forward if they had simply remembered that the men were supposed to be outside and recog-

nized that they were not outside and, therefore, had not gone forward.

So I am saddened that those flags weren't recognized, and disappointed by false statements of individual supervisors.

SRT TRAINING

Mr. HOYER. The thing that struck I think all of us at the time of the hearing, particularly after we talked to the representatives of the Dallas and Los Angeles Police Departments, was hearing the extent of what training had occurred with respect to the agents and particularly as it related to the integrated team on bringing people from various areas, there was a very short period of time.

And it also appeared that the basic training leading up to the post–Federal one of the organizational efforts had been relatively limited. Maybe you or Mr. Magaw would want to speak to this.

I was glad to see that flexibility is a part of this new organization that you have established for the purposes of coordination. It seems one thing we need to do is first make sure that we beef up our training on this kind of operation. Two establish some criteria related to the scope of an operation as to how much time is reasonable to allocate for the training of a group that may not operate together as a normal course of action.

Obviously we have response teams that are small components that operate in different areas and I imagine New York's is a pretty good sized one. But here we had a team larger than any that had been put together before. And the training essentially of this team was less than 48 hours in terms of having been deployed to that Army base.

WILLINGNESS TO ABORT

Would you like to comment on that, because it seems to me one of the things we have got to make sure is not only the lesson that if the plan is not as we planned it, better to abort than whatever embarrassment or lack of momentum that we will have the next time around.

To make an analogy, Christa McAuliffe was a very close friend of mine. She was, of course, the teacher in space who lost her life in the Challenger accident. Her husband was my law clerk. He is now a Federal district court judge. The lesson that NASA learned is that we have a lot of disappointments. If they are not 100 percent sure, they cancel, and it costs us money and I am sure it causes them embarrassment, but the bottom line is the lesson they learned: Better money and embarrassment than loss of lives.

In that context, it seems to me those two issues are central and I am sure, Director Magaw, you were concerned about them.

NEED FOR BROADER INPUT IN LARGE SCALE OPERATIONS

Mr. MAGAW. Mr. Chairman, I believe that the first response to that is that what this has taught me and all the men and women of ATF is that you don't undertake an operation of this size with this kind of difficulty alone, as one Bureau anymore. We just won't do that. You need not only the historians who can tell you about the group itself, you need religious experts as well as psychologists.

I think in reviewing this and reviewing the report that was done by Justice, you can see from the advice that came down that, maybe, had we listened to those experts and planned accordingly, we wouldn't have been in this difficulty. I don't believe any Bureau or agency in law enforcement is prepared to handle it by themselves.

RE-EXAMINATION OF SRT PROGRAM

Second of all, we are going to look at our SRT program. I believe in the SRT program, because it is used virtually every day throughout the country to make these very difficult arrests that our personnel are making. But we need to re-examine the kinds of things you are talking about.

Additional training; do we now want to look at all of Treasury and come up with one team that might be trained to respond to very difficult situations like this? And would it be multi-bureaued because other bureaus have some people who are well qualified, and if so, is that less expensive? Or do we want to do this kind of extensive training within our own Bureau with a restricted number that could be pulled from around the country should a situation like this arise?

So we are considering all of these things, taking each one of these lessons that you have related and determining the best direction to pursue. We are concerned with our emergency response teams when they are used in a larger combined activity—when we bring people from all over the country who haven't practiced together routinely.

Many of the units around military and law enforcement work three weeks during the month and train the other week together. So they are out on the street conducting their activities and once a month they really spend the week training. We are going to look at all of those and see how they apply to us and what is the most economical and logical.

It can get very expensive if we try to train all of these teams, and we certainly are not going to try to do that. We are going to try to train all of these teams for a larger goal. We will look at everything and then make a judgment.

LACK OF HISTORICAL PRECEDENT

Mr. HOYER. You know, you said bring the historians in. We had all the law enforcement officers that testified at the last hearing observe that they didn't know, and you have reiterated that, any analogous historical precedent for a raid of this size, which had the kind of response that this one met. Never before have we had such firepower directed at law enforcement officials in this type of a raid.

Therefore, it was difficult. To that extent, this event, as tragic as it was, can serve as a lesson and learning tool for all law enforcement. We are, tragically, increasingly confronting in our society and around the world the use of fairly sophisticated firepower by private citizens who are bent on military responses, or paramilitary responses to situations that confront them.

And we are going to have to really think in a different way. There is no doubt that we are going to have to confront these

groups in the future. There is no doubt that we are going to have loss of life in the future. There is nothing one can do in this context over time that will absolutely make this a risk-free environment in which you are operating.

We will never be a risk-free environment. But so many mistakes occurred here.

SECURITY RISK

Respond to me once again, then I have taken too much time, I would yield to Mr. Lightfoot. One of the things that struck me as very basic to a covert action is that it be covert. This was clearly a covert where the element of surprise was critical.

We deployed large numbers of people in a town essentially, traveling to and from a town, in a relatively indiscreet fashion—perhaps "relatively" is an irrelevant word—indiscreet fashion where townspeople and others clearly were going to get the impression that something was going on.

I realize that we were speeding up the operation for the purposes of trying to beat the newspaper story. That is one of the things that compelled us to go early. Remind me what the report's conclusion was as it relates to this seemingly contradictory action, when premised upon a secret activity.

Mr. NOBLE. You are absolutely correct, Mr. Chairman. There were not enough safeguards with regard to operation security in this planned raid, and I would dare say that even if the raid had gone forward on Monday as originally planned, as opposed to Sunday, the same plan would have been in effect.

You would have hundreds or in excess of a hundred ATF agent personnel arriving in or near the town of Waco, Texas, certainly bringing the appropriate attire that they would need. They would need to house themselves and eat, and we know how we are with idle chatter, and sometimes not so idle chatter.

So there are all these potential threats to operation security. You also need a contingency plan, so you need the medical emergency team, you need to locate and identify and advise the law enforcement officials in the local area. So you have all these potential threats.

Then you have the activity itself of the press. The news media was investigating this. There is a possibility that within the press there would be sharing of information. So you have all these threats and risks to operation security and then we have a diversion of your focus.

Instead of thinking about operation security as you originally or initially might have, you hear about the stories which are going to be reported and you begin to wonder, will this story change Koresh's pattern, instead of thinking about all the other ways in which Koresh might have found out about this. I worry when I think about the situation, what if we were not able to identify the source of the tip to Koresh, if we didn't know that the mailman who talked to the cameraman went in and warned Koresh?

There would be 10 or 20 or 30 different areas where we would say perhaps this is where the operation security broke down. So it is different when you plan an operation in New York City or in Washington, D.C. where you have training facilities locally, you

have got the resources there, you can just bring them in, go home, come to the site where they are supposed to come, as compared to going near Waco, Texas, with three SRT teams, the support personnel, where you have got to stick out like a sore thumb.

I think that is why one of the things Director Magaw articulated in his prepared remarks, is no one thought about ways in which to monitor whether or not a tip occurred during the time the undercover agent left and the raid began, whether it was through Title III electronic surveillance, if we had the proper staff people, or whether it was through—and I am not suggesting this, it is a theoretical possibility—whether it was through leaving a bug in there or letting an undercover agent stay in there longer.

There were thoughts as to operation security which just didn't occur to ATF. I think it was because they became so focused on the news stories that were being published by the Waco and Tribune Herald, that they forgot about the most basic thoughts about operation security that they exercise and employ in most standard operations.

Mr. HOYER. I have a number of other questions, but let me turn to Mr. Lightfoot, and then to the other members.

Mr. LIGHTFOOT. Thank you, Mr. Chairman. I will follow along with your thought and maybe this will be a question for Mr. Thomson. As far as the role that the media played in the whole Waco event, what is your overall opinion of that? Positive, negative, what role did they have in it?

Mr. NOBLE. My opinion of the role of the media in this is I would like to focus on the media that covered the raid and not make a general statement about the media. And I know that I do this even at risk.

The media's right to report to the public is a right that I respect and the media's right and obligation to do it as quickly and as accurately as possible is something I also respect. But something that concerns me very much is the media's failure, and I am just talking about the report that was generated by the Society of Professional Journalists about looking at Waco, to look at themselves like ATF and Treasury look at themselves. I see no indication that they believe that there is a need for them to assume an obligation for thinking about ways in which their actions might pose a threat to the operation security of investigations about which they are aware.

That is if they know there is an investigation that is secret, that is targeting a group of dangerous people, which if it were revealed to the public at large or revealed to the group might pose a threat to the agents, to their own reporters and camera crews, or to innocent lives, then it seems to me just as law enforcement thinks about ways in which it should safeguard operation security, the media ought to think about those things and see if there is a way for them to discharge their right to cover a story without posing an unnecessary risk to the people involved.

And I would just point to an example of the media's conduct in Waco that I find disturbing. That is they knew the raid was scheduled for 10:00 a.m. and using common sense one would know that ATF could not set up roadblocks at 5:00 a.m. or 4:00 a.m., because obviously if the roadblocks are set up too far in advance of the time

of the scheduled raid, it would alert people inside of the possibility that something unusual is happening.

So when did they arrive at the scene? They arrived at the scene before the roadblocks were erected. What did they do? They patrolled up and down the roadway. They went to a house where they didn't know the residents or the occupants and they said, something's going to be happening, can we watch from your property?

And while that certainly deals with the trespassing issue, it doesn't at all deal with the possibility that they may be jeopardizing operation security. Now, I know for the media to work closely with law enforcement poses a problem one would think. If it were a problem between ATF and the FBI, we would say better coordination, that is where a problem arises.

If the media is working too closely or even is working at all with law enforcement before a raid like this, then all the criticism that we heard leveled at ATF would occur. Why are they inviting the media along?

So how do we work out that difficult tension between the media's desire and obligation to report on matters independently and accurately with the obligation of law enforcement not to pose unnecessary risks to operational security by inviting the media along?

So I think not in the context of a particular operation, but in a broader context the media and law enforcement have to get together to talk about the general global theoretical questions about our individual obligations and see if we can educate each other as to how to be more sensitive to operation security and dangerous missions.

You want to——

Mr. THOMSON. No.

Mr. NOBLE. You are smart.

Mr. LIGHTFOOT. That is why he has got the new job, right? Well, I appreciate your comments, and it is a difficult thing to try to balance.

It also puts the added burden on the agents on site that you have got a bunch of people running around out there and their safety becomes important to the agents as well and can certainly distract them from what in this case was a very difficult and complex task to start with. You don't need another log on the fire, so to speak, when you are in that kind of a situation.

Mr. NOBLE. That is a fair point, Mr. Lightfoot. That is something the media doesn't always think about. One view we have heard reported is that members of one of the entities said, well, we thought when we got there law enforcement would control us.

They didn't stop us. We were going to go as far as we could, because by not stopping us, the fact is it must mean it is okay for us to do it. You raise a very important point.

If there is a secret raid, if the groups are training to do one thing and everyone is supposed to be in a certain place and you suddenly see people running about, we know law enforcement's obligation to protect innocent people. So you divert the attention from the target to protect people who have no business being there.

And that is, how did the T.V. crew get there, were they invited? They were absolutely not invited. What did they do? They intercepted a caravan of cars. The next thing you know, we have got

half-a-minute or a minute to get there. Their vehicle is there, you can't stop the raid, say hold off, go back and start over and surprise them once again. So your insight is well-taken.

Mr. LIGHTFOOT. If you carry that one step further, had you tried to control the media, there would have been all kinds of editorials about how ATF doesn't want us to know what is going on.

Mr. NOBLE. Absolutely.

Mr. LIGHTFOOT. You are kind of between a rock and a hard place, aren't you?

Mr. NOBLE. That is why in that situation one of the things we have to think about in law enforcement is if there is no way to do it because of a threat to operation security, that the Chairman has highlighted and you are focusing on now, maybe what we have to do is we can't go forward with this plan, we have to think about something else, because the threat to operational security is so great that there is no way we can ensure the complete sanctity of the operation. So we have got to be able to walk away from an operation.

Now obviously, it is harder to walk away, just being candid, from an operation like Waco where everyone's being flown in, everyone's being brought in, and the manager is at my level and Director Magaw and Associate Director Thomson's level, we have to recognize that once the operation gets such momentum, we have got to be able to signal the people there, look, if there is any reason, as was done by Director Higgins in this case, we have got to keep reinforcing it, if there is any reason to believe things aren't right, call it off. We will support you, we won't complain about wasted resources as the Chairman has pointed out.

We have to get that message to the rank and file and the supervisor, if it is not right, don't go forward, as you highlighted the education at NASA and others in procedural matters.

Mr. LIGHTFOOT. I think that is a very important point, that I think on which we are probably in agreement around this table. But the other side of the scenario, had it been called off, there could have been a lot of criticism of why you spent all this money, why you sent all these people there, and then you backed off at the last minute. You are going to have that kind of Monday morning quarterbacking as well.

Mr. NOBLE. Or worst case scenario would be, if it was called off and on Monday or Tuesday, Wednesday, the group decided to go into the local community and create havoc or mayhem or harm. As Koresh had predicted and as the review uncovered the plan Koresh had was that he tested his group on at least one occasion to go into the local community to a fast food establishment and, you know, kill the non-believers, harm the non-believers.

Law enforcement, once we are aware of alleged criminal activity occurring, if we don't do the right thing, if anything goes wrong, then we receive criticism on either end. I am not saying it is inappropriate to be criticized when mistakes are made, but the public, Congress, and you in this committee, have been very, very understanding. We have to recognize that these are not easy questions that have a sort of checklist solution.

Mr. LIGHTFOOT. And we can't legislate judgment, no way.

The other thing, too, I guess, and the Chairman was talking about it earlier and you were discussing whether it is a covert activity, that they should be kept secret and so on. From reading the report, unless I misinterpret it, some of the information that the raid was going to take place was from a conversation between this cameraman and a lady friend of his who was involved with one of the ambulance companies who was aware that they had been contracted.

I guess it goes back to the old military thing that loose lips sink ships. But when you are not in a military-type surrounding where you have total control over all of your people, I don't know how you are going to handle that one. I guess that is one you are going to have to try and work out.

Mr. NOBLE. Yes, sir.

CHANGES IMPLEMENTED BY MR. MAGAW

Mr. LIGHTFOOT. Let's go to the future for a minute. Mr. Magaw, since you are now the Acting Director, what kind of changes have you put in place at the office, and so on, that were a result of Waco that you think are going to be forward looking?

Mr. MAGAW. One change that I have made is that instead of two Deputy Directors within the Bureau of ATF, there will now be one. Mr. Dan Black, who is in the room here, is the Acting Deputy Director. He is from the compliance side of the house. Charlie Thomson, coming in from New York, is the Associate Director.

Mr. HOYER. Mr. Director, who is Dan Black? Fine, okay. Just wondered. Thank you.

Mr. MAGAW. Charles Thomson came in from New York, as the Associate Director for Enforcement. It used to be that the enforcement associate director and the compliance associate director were also deputy directors. And when you have two deputy directors with all that responsibility also under them, in the absence of the director or in receiving information presented to the director, sometimes they don't serve him as well, although they try to. So that is one of the changes that I made.

And I also have asked the Deputy Director and Mr. Thomson to go forth and select a committee from across all ranks of the Bureau of ATF, and begin a study with about a three-month turnaround on the structure of ATF, how it should be structured, currently, and then to run into the year 2005 or 2010. So those are the two main things.

I didn't want to get into further restructuring until I had the people who best knew the culture of the bureau to take a look at it. That is what we are going to do in the immediate future.

USE OF INTERAGENCY SRTS

Mr. LIGHTFOOT. You had indicated earlier you are a strong proponent of the SRT proposal, and that was one proposal in the report that we have a regional or national kind of an SRT. You talked about that a little bit earlier.

Is that a feasible kind of thing, that we could have a national SRT team that would be cross trained, maybe used between several agencies, such as you folks, FBI, Customs, whatever?

Mr. MAGAW. I don't know that you would cross agency lines. I think we have to look at that. We would want to keep it within Treasury at the present time. Certainly as we see that successfully develop, then we could look across agency lines.

If you do take a team that is a national team, you set your training up so that it does include members of each of the bureaus involved, so that you bring the expertise of that bureau, that agency, all together in the team. And then you train regularly. You train once a month for a period of time and you set up different sequences each month. That is a feasibility question that we would want to look at.

There is a high cost when you start to set a certain number of people aside to do an event that may not occur this next year or the year after. We have looked at a couple of investigations that are pending now in ATF that don't have the magnitude of Waco, but are similar in kind in that they involve groups and different approaches to confiscating or taking possession of a large number of weapons within their cache. It often takes a long time to work these cases out. So you could have a group that you can bring together and make a larger group out of with different expertise involved and then use that training just prior to, 30, 60 days before. You can make charts and diagrams and do remote locations and move them in at the last moment.

We are looking at that possibility. As the Chairman stated, this situation isn't going to go away.

Mr. NOBLE. Can I——

Mr. LIGHTFOOT. Sure.

Mr. NOBLE. I just wanted to highlight a point that the Director made. In theory, the concept of a national response team during lean budgetary times is very attractive. And the Director and Associate Director and I were committed to looking with the Attorney General and the Deputy Attorney General to see whether that would be feasible.

Currently, the way the FBI's Hostage Rescue Team operates, once it comes on to the scene it takes over and it doesn't integrate other agencies into their mission. And one question is whether or not by training throughout the year, by integrating ATF and Secret Service and Customs and DEA and the FBI in a national response team, whether there is a different model. So we are open to considering anything.

In the meantime, we have an obligation within Treasury to discharge our responsibilities. We are trying to do that in a fashion which is not unnecessarily expensive, but which is certainly mindful of safety issues.

ATF/FBI MERGER

Mr. LIGHTFOOT. It leads me to the question that no one wants to ask but should. Probably in the general public's eye I think of ATF, the gun enforcement side of it, as what probably comes to most people's minds. They don't stop and think that you collect billions of dollars a year in taxes for the U.S. Government in the form of alcohol and tobacco taxes. You have a very distinct role for your agency.

This isn't part of the report, but there has been a lot of talk about merging ATF into FBI and a number of other combinations. You are the new Director. What do you think?

Mr. NOBLE. I was going to take the microphone from the Director.

Mr. LIGHTFOOT. Do you want to do it?

Mr. NOBLE. No. I will let him answer.

Mr. LIGHTFOOT. By protocol, Mr. Noble, I guess you can.

Mr. MAGAW. I am concerned with that idea. I believe that the larger organization that you have, the less responsive sometimes it may be. How does it line up its priorities? And how high are guns on its priority for this particular year, or explosives? When there are specific duties, such as those assigned to ATF in terms of arson, explosives, firearms, alcohol, all of those kinds of things, it makes it much easier I would think to administer and for you to supervise and for us to report back to you.

ATF combines revenue collection with regulatory and criminal enforcement. On the regulatory side, the inspectors do a great deal of investigative work through firearms dealers and the acquisition and disposition of firearms. They then report back to the enforcement side and if enforcement is to be taken, it is done at that point.

On the revenue side, you are exactly right, almost $14 billion is collected. Now, where would that go? Well, the proposal is it would go under the Internal Revenue Service.

Where does that then fall in their important list of things that they have to do, and then what do the inspectors who are out there doing all this legwork and getting cases ready for the enforcement side to take over, who does that now?

So I have a lot of concerns in those areas. And also when you start to do this—and I realize now DEA is not going to go under the FBI—but when you do this, you are very, very close to a Federal police force. And that is my concern, very difficult to work with, and I am not sure that it was the intention of Congress.

There are checks and balances through every function of government. This would lessen those checks and balances. So I believe that it is not the thing to do.

Having said that, once you decide what we will do, the President decides, we will step forward and be the good public servants that we are. All I am trying to do is vet our concerns.

TITLE III

Mr. LIGHTFOOT. Well, I appreciate your candor.

And, Mr. Chairman, I think I probably ran long on my time. I would like to ask one final question, then I will be quiet.

In view of the report, and, Mr. Noble, you made a comment earlier on talking about Title III. Because it appears an intelligence breakdown was part of the problem here, maybe a major portion of it, that it wasn't as good as it should have been. When it was gathered, there wasn't anyone to evaluate it properly, it didn't get through the channels correctly and so on.

In light of the report, I am not one of those people that thinks Congress can fix everything, but there are possibly some things we could do in terms of looking at Title III, some of the other things

that would be beneficial to help you in the future in dealing with these kinds of situations. Is that a fair question?

Okay. I got the blessing of my Chairman.

Mr. HOYER. I am sure they will give a fair answer.

Mr. LIGHTFOOT. I expect nothing less.

Mr. NOBLE. Could I answer the question you asked Director Magaw?

Mr. LIGHTFOOT. It is up to the Chairman, Mr. Noble.

Mr. HOYER. On that, you may want to answer this first, but you may want to comment on that. That obviously is not per se the issue here, but clearly one of the concerns raised, that because ATF was placed in a bad light, that that would perhaps add to any impetus.

I am one of those who agrees with Mr. Lightfoot and others that merging ATF into FBI or DEA into FBI is not necessarily the best thing to do, even if one adopted the premise that it might be more efficient in terms of dollars, but not necessarily more effective in terms of law enforcement. So if you wanted to comment on that, that would be—that is certainly appropriate.

Mr. NOBLE. I would like to comment on that. The Director is correct and you are correct and the committee is correct. You know, our country is based on a principle that there is no one Federal law enforcement agency that has reposed in it all the powers and authority to investigate and enforce the will of Congress. And in Waco, one thing that came out of it which was very good is that you saw that you had two departments look at itself, at themselves, and come out with two views of what happened and why.

We have the ability within Treasury to have agents other than ATF look at ATF and look at it fairly and comprehensively, and that is a good thing. We also provide in Treasury law enforcement a check for the Attorney General as she does for us.

For example, if the Attorney General would get advice on any law enforcement matter concerning a proposed action of the FBI or DEA or U.S. Marshal's Service and she wanted to get the perspective of law enforcement officials who do not report to her, she could consult with me or with Director Magaw or Associate Director Thomson, or others, so there are good things.

Second, if people are talking about consolidating, we have to understand what the problem is and why are we going to consolidate. And if as you say, Mr. Chairman, it is a response to Waco, well, that is not the intention of the Secretary and that is not a good thing.

Why with 22,000-plus warrants ATF participated in, Waco unraveled what happened and can be explained. Despite all the failings of the plan and the raid and so forth, the investigation was a good investigation, it was thorough, it was comprehensive. The undercover agent, though for 40 years old he might seem to be an older college student, he went in there and came out with the information any operation would want. They could have stopped it, they should have stopped it. It was a failure, I believe, a judgment mistake, because of a whole host of situations.

We in this administration are committed to looking at things anew, to say what it is that Treasury law enforcement does that supports the administration, supports the American people. What

is it that the Department of Justice does and how can we best do what we do.

Now, the NPR said that ATF would be consolidated into FBI following DEA's consolidation into FBI. I read as you have read that that is not going to happen. It seems to me what that suggests is that we are going to look at the whole question again of how is it that we can do what we do in a way not to unnecessarily duplicate or waste the American taxpayer's dollar, while holding true to our notion that the division of Federal law enforcement responsibilities is a very important thing to consider.

Mr. LIGHTFOOT. Okay. Thank you.

Do you want to answer the question about what Congress can do or is there anything we can do or just stay out of it?

Mr. NOBLE. I would say one thing is hearings like this, as tough as they are to prepare for, your oversight responsibility is important. It requires us to look at ourselves, knowing we are going to be asked tough questions. I am not just saying that.

The second thing is legislatively, I really believed what Director Magaw referred to and what I talked to the Chairman about when you were very gracious in giving us time to construct this review—is the question of whether there is a way to gather information prior to a raid without unnecessarily interfering with the constitutional rights of privacy that citizens have, with an eye towards only revealing whether or not they are aware of the investigation of the raid prior to the raid's going forward. We are exploring those options and we look forward to working with the committee in that regard.

SALE OF CONVERSION PARTS

Mr. LIGHTFOOT. Did you have anything you wanted to add, or Charles?

Mr. MAGAW. We hope that we would look at legislation that would control the sale of some of the parts which this group did buy and which other groups are now buying, which takes a semi-automatic weapon and with a little bit of adjustment makes it a fully automatic weapon. So we are hoping that maybe you can look at legislation or propose some ideas along those lines.

Mr. LIGHTFOOT. Thank you.

Thank you, Mr. Chairman.

Mr. HOYER. Mr. Visclosky.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. Secretary, Mr. Director, Mr. Thomson, I appreciate very much your testimony today. In looking back over the events of Waco and the two years' experience I now have on the subcommittee, I, without trying to be simplistic about it, view the situation as one of mistakes in judgment having been made. As a person who makes mistakes every day, I try to avoid them and learn by them.

I think the other issue here is one of trust. As I mentioned, Mr. Secretary, to you in the past, during the two days of oversight hearings earlier this year, I believed I was lied to by at least one member of ATF. As both of you gentlemen have testified today, and as is contained in your report, that that appears likely, relative to a number of ATF employees.

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Subsequently, it was pointed out that perhaps I wasn't lied to, but I didn't ask exactly the right question of two individuals. That is a common game sometimes on Capitol Hill. But in areas where people's lives are at risk and where we are talking about the administration of justice and the control of the judicial process, I don't think it has any place.

The report that was done, and I would echo the words of the Chairman and Mr. Lightfoot, is probably the best that I have seen in my nine years of Congress in being absolutely thorough, unflinching and honest. I in no way have anything but the highest regard for the integrity of the three people on the panel today. And as I mentioned in the past, I have a personal stake in ATF.

I have three friends from grade school and high school who have all found a way to ATF. Not DEA, not the Secret Service, not the FBI. They all intended to end up in ATF. Which tells me, gee, that is an organization that people should belong to, because of the respect I have for them.

Knowing them, I also know that some of the misstatements, if you would, or lies that were told, are very uncharacteristic of ATF employees. It is my concern now that perhaps the gravest damage done to ATF, is the reputation of the trust. You can't do anything about that.

Sometimes people are going to err. To at least hedge on the possibility in the future, the fact that you had periods of time here where misstatements may have been too readily accepted internally within ATF, and pressure to perform or pressure to follow through on the raid—are there some things institutionally that you are concerned about to ensure that we minimize the risk of this happening in the past?

And, again, I would want to be very clear, I think that this is an aberration. I don't think this is representative of ATF or the people I have dealt with. But it remains an issue of concern relative to your ability to function appropriately in the future.

Mr. NOBLE. Let me first do what I should have done in my prepared remarks, and that is to apologize for the lies and/or misrepresentations or lack of candor that happened during the hearings that were held on the part of ATF. And as a representative of the Department of Treasury, I accept responsibility for that.

But let me just highlight a couple of points. One is this committee has been very patient with Treasury and it was patient with ATF. You never required us to go public and testify about anything that we didn't have personal knowledge about.

Mr. Chairman, you took great care to give us that protective measure. Any time we didn't have personal knowledge, we could have said I am sorry, sir, I know you would like an answer, but I don't have personal knowledge.

The second protection you gave us, which ought to have been exercised and it ought to be exercised in the future, is you gave us the opportunity of going in Executive Session where there are no cameras, there is no public there, but can still assure yourself of your right as representatives of the legislative branch of giving a check on the actions of the executive branch.

So we have got to communicate to people if there is a dicey question or a question that could be taken two ways and they are con-

cerned about it publicly, ask the committee chair and representatives of the committee whether or not we could come back to you in private session, Executive Session to do that.

The third thing is what you've highlighted to, alluded to and everyone has embraced, and that is this independent report was possible because this committee was patient and the Secretary of the Treasury and the President were patient. That is, you said, "take an appropriate amount of time and find out what happened and why. We will wait. We are not going to comment publicly even though the cameras are rolling, we are going to wait."

And what happened, the agents, the rank and file agents of ATF came forward and said, you are not hearing the truth, we want to tell the truth. They spent sometimes a couple of days being interviewed and being debriefed about what happened. I witnessed very strong agents breaking down into tears, crying, when they had to relive what happened.

So the good news is the organization has a sense of honesty, even when they knew the truth might not be favorably received. The second point is how has Congress, how has the public, reacted to this report? They have come to the support of the rank and file agents and institutional ATF. They said this reflects a department, an organization, one that looked at itself honestly and openly and we applaud that.

We also have a director now who is looking forward and saying the positive things that ought to be said. If you want something done differently, if you want to tell us what is happening, I am convening this group of cross-section representation of ATF.

So I am saying the message I think from the Department of the Treasury's report, which was possible because of your patience and the patience of the Secretary of the Treasury and the President, is that the American government, its executive branch and legislative branch, can look at itself honestly, comprehensively and independently.

I would also like Director Magaw to take a moment and talk about what he is doing to ensure Congress and ATF that only the good things will be in the front.

ATF CHARACTER

Mr. MAGAW. Well, the key thing that makes me feel very comfortable is that these are good people. Knowing, as Secretary Noble said, that the news they were about to tell was not going to be well received, they would not allow beyond a few days a hierarchy or anybody else to misrepresent them or tell untruths. And they rose up. So I think their integrity is even more so than it was before.

But I have been going around and I am going to three offices next week and two this week, visiting with all the employees, talking to them about the integrity of what has been done here, about the brutal report, but truthful one, that we have to look at, and pull ourselves up by the bootstraps and move forward. And as we do that, remember that the truth that was told here in the end is the right thing to do in the beginning.

Also, we are looking at our integrity training throughout the Bureau from our very brand-new personnel to our very senior personnel. We want to talk a little bit about truthfulness in a relaxed sit-

uation and the pressure to not be so truthful sometimes in a stressful situation and see if we need to do some training along those lines so that never breaks down again.

Mr. NOBLE. May I just allow Mr. Thomson to——

POSITIVE OUTCOME OF CANDID REPORT

Mr. HOYER. May I make a comment before he does? You reference this report as brutal. I understand what you mean. But let me make an observation. During the course of this event, there were two—you used the word seminal in your report—two critical stages.

The public is very concerned about those of us who are given responsibility and great authority by them, to ensure the welfare of their society and the safety of their society. In this particular instance, there were two things that happened, it seems to me, that are going to hopefully go some way towards making sure the public knows that, yes, we are going to mess up, but we are going to take responsibility for it and move on and learn from that.

Janet Reno stood up and said I am responsible, I made this decision. I think I made the right decision. I wish it had not resulted in the tragedy in which not only those who had the ability to make decisions but the children who had no ability to make decisions, a sad and tragic loss of life.

The second is, this report is the same thing. I was concerned about, and you know that, that we would have some sort of—whitewash would overstate it, but a report that was less than candid and direct and brutal, as you say, Mr. Magaw. Because if that had occurred, the public would, who understands that we are going to take risks, who understand that we will make mistakes, all of us in this room, we are going to make mistakes. What they don't understand is when we pretend that, oh, we don't make mistakes.

This report doesn't do that. Janet Reno didn't do that. I think those two instances are going to make this, as tragic as it was, a learning experience where we will do better in the future. Excuse me for interrupting.

Mr. NOBLE. Thank you, sir. No interruption.

Just talk about your experience with ATF and your sense of the integrity of the organization and its agents.

INTEGRITY OF ATF AGENTS

Mr. THOMSON. I have been with ATF 22 years. I have been the SAC of New York City for the last five.

Mr. HOYER. That doesn't sound like a Washington accent.

Mr. VISCLOSKY. He's not from Jersey, either.

Mr. HOYER. Mr. Olver almost likes that accent, I will tell you.

Mr. THOMSON. New Hampshire and Massachusetts.

Mr. OLVER. I am a transplant, so I don't even notice those things.

Mr. THOMSON. I think the report speaks very highly of the integrity of ATF agents. Although a few people have been named, the agents themselves have high integrity and they always have had. And it has been my experience that when we do have integrity problems, we have always addressed them. We have an Internal Affairs Unit to handle those kind of things.

We take appropriate action when necessary. I think we are going to go forward from here and I think this is something we are going to build on. I see a better ATF as a result of this tragedy, I really do.

Mr. HOYER. Did you have any more questions, Mr. Visclosky?

Mr. VISCLOSKY. No, I am fine, Mr. Chairman.

Mr. HOYER. The transplant from Massachusetts, Mr. Olver.

Mr. OLVER. Thank you, Mr. Chairman. Thank you very much for putting this together and for appearing.

I have a feeling that the report that you presented there, which has gotten virtually universal good marks, allows me to know more than I ever wanted to know about this issue, but it also leads one to give thoughts to it that might otherwise not have come as well.

I am curious here. You don't deal with DEA, with drug enforcement. What characterizes the difference between ATF—Alcohol, Tobacco—when alcohol is certainly termed a drug, and DEA? Why should I view those as different?

Mr. THOMSON. We deal with DEA on a daily basis.

Mr. OLVER. Is it in Treasury?

Mr. THOMSON. No, DEA is in the Department of Justice. But guns and drugs cannot be separated. So as a result, a lot of our investigations are joint investigations, working through the U.S. Attorney's Office. We go through that just because we have a relationship with DEA. If we're involved in an investigation that involves guns and drugs then we get involved with DEA——

Mr. OLVER. Why are they appropriately separate then?

Mr. THOMSON. That I cannot answer.

Mr. NOBLE. Well, I can say Treasury is about, as we all know on April 15th, in part the collection of revenue. And with Alcohol, Tobacco and Firearms, they are regulatory components. They are compliance programs. So, for example, if we are investigating an entity that we suspect to be not reporting the weapons themselves or to be avoiding the requirements of the Federal firearms licensing statute, what we do is we send our compliance people there to investigate it. And while investigating it, we may learn that in fact guns are being sold to drug organizations or other organizations and that is where the criminal law enforcement component comes in as well.

The second reason why is when we had this spate of violence throughout the United States, we had people who are committing crimes being returned to the streets time and time again. And Congress passed a statute concerning career criminals. And that is something where we get people who committed one, two, or actually three felonies who are in possession of a fireman, we are able to get them off the streets for a significant period of time.

As Director Magaw alluded to, ATF works so well with State and locals, that we set up a lot of joint task forces. So Treasury's responsibility for collecting revenue and for investigating the gang-related violence that occurs with career criminals being in possession of firearms and whatnot, we have Treasury that does both enforcement of the criminal statutes for career criminals in possession of firearms, we have a convicted felon in possession of firearms, and we also have Treasury engaged in the collection of revenue related to the licensing of alcohol, tobacco, and firearms.

Mr. OLVER. Okay. So one clear difference is the revenue issue. But now on an ATF, do you function outside the country? Or is it totally within?

Mr. NOBLE. It is essentially totally within.

Mr. OLVER. Essentially totally within. Because clearly a certain amount of the drug enforcement involves interception of transit points and so forth in various places. But also the way our laws are, controlled substances are illegal, in essence, and so we are not taxing them, so there is no revenue involved in it, though a hell of a lot of money is passing hands in the whole drug operation.

Mr. NOBLE. Yes, we abhor the thought of drug trafficking, so we don't tax it. We punish it through enforcing serious laws against them, you are right.

Mr. OLVER. I don't mind us saying we have got to all be separate here, but if this ends up with failing to allow for the proper articulation of resources of those agencies, then I think we're making a serious mistake.

Mr. NOBLE. If what results, I am sorry?

Mr. OLVER. If the separation of the agencies doing things. I mean, for instance, one of the key features of this, is that we have quite an arsenal here of arms. How many of these arsenals are there in the private sector out there, either with organizations or with organizations involving drugs or whatever it may happen to be, that would be of the same scope as the arsenal of automatic weapons and other things that I would consider characteristic of military organizations?

How many of these sorts of things are there out there that might be arguably of the same scope?

Mr. NOBLE. When you say the same scope, I am not certain I understand, but I can tell you enough to worry about. I would just follow up on your point.

Mr. OLVER. But aren't they—they are obviously now in areas where you have responsibilities, but they are probably out there in drug areas as well, I assume.

Mr. NOBLE. I can say yes, it is possible for both. But I would just take you back to the hearing when Mr. Visclosky brought out the point that if we take Waco and what the Branch Davidians were doing, although there was the drug nexus, the hook, this was really an organization that had nothing to do with drugs, yet they had a lot to do with potential violence. That is the first point.

The second, why do we have the separation, whether it is the separation in Justice or the separation outside of Justice? We have it because we know when it is separated, that pursuit becomes the highest priority. So if I have a pain in my chest, I go to a specialist if I know that is a pain in my chest. If I have a pain in my ankle, I might go to a specialist. It doesn't mean general practitioners don't provide a valuable service.

What ATF knows, they know explosives, they know arsons and they know firearms. They know how to track them, they know how to find all of them. They also know how to work with State and locals much better than any organization, at least if not better, as good as.

With specialization comes a lot of benefits. There might be cost of duplication. You want to make sure it is not unnecessarily sepa-

rated. But the thought of having a focused and unique focus on firearms and violence related crimes is something that I think led to ATF's getting its jurisdiction for armed career criminals and for convicted felon possession of arms.

Mr. OLVER. Well, it may be that your investigators in other places have seen these kinds of arsenals, and they have been dealt with in a totally successful way.

The most successful program, seems to me, in this kind of law enforcement is one where you only find out about it after it is completed.

And in drug enforcement, I can remember numerous cases where afterward you find, oh, there has been a drug raid that had 10 different locations in a city or in a territory that comes under the jurisdiction of a single U.S. Attorney or a district attorney with a State's district attorney, whatever other law enforcement agencies, FBI or whatever, that have been involved in it.

And I hear nowadays that a good many of these are finding at least the character of the arsenal, not so very different, although the scope of it, the size of it, being very different.

And so it seems to me that unfortunately we are going to see in a number of these different categories with the different enforcement agencies seeing this kind of arsenal appearing.

Which leads me back to the comment that I made: If the separation of agencies doing different things, when one characteristic that we are apparently going to see until we deal with it is the presence of arsenals of at least this character, if not this scope and size, if that leads us to anything that does not allow articulation of knowledge and resources among those agencies, then that is going to leave us in really deep trouble.

Mr. THOMSON. I agree with what you are saying. Another component of ATF is directed against these arsenals in that we do firearms trafficking investigations. We have specialized groups around the country that try and locate the illegal sources of these firearms. In the source States we attempt to intercept these guns before they get to the organizations or groups that are amassing arsenals. Tracing firearms is a very important function—to know where these guns are coming from, where they are going and try and stop them before they get there.

Mr. OLVER. Oh, my.

Mr. NOBLE. Could we have the Acting Director answer?

Mr. OLVER. Certainly.

Mr. MAGAW. Congressman, when we find that our jurisdictions are mixing with that of DEA or the Bureau, in other words when a drug case comes to us because of guns or guns come to a drug case DEA is investigating, we form that task force very quickly. And those task forces vary as to who is the lead agency. A lot of times it is the United States Attorney with the district attorney.

And on that task force would be our representatives, DEA if applicable, FBI if applicable, and local law enforcement. And those task forces all over the country do an enormous amount of work together.

And that brings the expertise of each one of those areas together when needed. But when not needed, it still allows those bureaus to go after their priorities.

In the case of the DEA, a number of years ago, because of the drug problem, DEA was organized to pay specific attention to that problem. And as it goes away or as it lessens in years to come, we hope, then you would make another judgment as to what the needs were so that we do come together.

I would want to clarify one thing. And we would talk to you about it in closed session if you would like. But we do have some of our personnel in foreign countries as does DEA and other Federal bureaus. But we would like to talk to you about that in closed session.

Mr. OLVER. Okay. One of the things that comes through on this one to me, the actual event starts around—the zero time, something like 9 o'clock, you are out there in the central time zone, on February 28th in the morning.

How much before that is the first—your identified understanding that secrecy may have been compromised, was compromised? I don't have clear exactly the timing of when the first of the——

Mr. NOBLE. Certainly the raid itself was scheduled for 10 o'clock in the morning. It happened almost at 10 o'clock in the morning.

So several hours before that there were media vehicles patrolling the area.

Mr. OLVER. Sure. But the cameraman and the mailman and so forth that you alluded to, when did that occur? When did the first indication of loss of surprise happen?

Mr. NOBLE. If I can just take you backwards from the time the raid occurred and tell you when they first found out about the supposed or deduced tip.

The undercover agent who was inside the compound at or near 9 o'clock in the morning had gone in earlier that morning to meet with David Koresh.

The undercover agent was meeting privately with David Koresh when a person came into the compound and Koresh was called away from the meeting with the undercover agent. He was told that he had a phone call, and he left the undercover agent.

He came back visibly shaken, looking out of the window, dropping his bible, saying, ATF and the National Guard are coming; the time has come, Robert; the time has come.

The undercover agent leaves.

Now, 40 minutes elapse from the time that the undercover agent left and the raid began. So there's at least a 40-minute period during which ATF had information that Koresh knew or had reason to believe that the raid had been compromised and the element of surprise had been lost.

Mr. OLVER. So that is the earliest that you had any indication that Koresh might have known.

Are there known contacts on the outside where loose talk or whatever, that you know about, could have——

Mr. NOBLE. We have convinced ourselves and we believe based on all the evidence that the tip occurred when I just articulated. But despite all of these breakdowns or possible breakdowns of operation security——

Mr. OLVER. That is amazing, given the fact that by the time 10 o'clock comes around, from what you describe of the cameramen up

and down, already being inside the road blocks and so forth, it sounds almost like a carnival atmosphere going on there.

It must be very difficult now when military operations like the one in Somalia, when we get into Somalia, we find that the cameras are all there waiting to, in essence, welcome this military operation, which was an unusual kind of military operation, indeed.

When we are in open society and when the media are there and—what are the responsibilities of all those?

But I do go back and do again note that I have seen so many drug raids where it is only after the fact, when there are a number of different locations where there is a sizeable amount of drugs and weapons and so forth with a number of people and a lot of different locations seem to manage to keep secrecy in that situation.

Mr. NOBLE. Well, ATF does that quite frequently.

DEA and FBI——

Mr. OLVER. We have probably just never just heard about all those that work well.

Mr. NOBLE. That is exactly right.

As I mentioned, last year alone there were a combined 20,000-plus search warrants and arrest warrants executed by ATF, either alone or with State and locals, without incident otherwise. So you are absolutely right, sir.

Mr. OLVER. I think I am done.

Thanks.

NUMBER OF ATF WARRANTS SERVED

Mr. HOYER. Let me review just briefly, and then recognize Mr. Lightfoot and then have a few comments as we close.

You mentioned the figure, but how many violent warrants were issued last year—issued and served last year? Do you recall?

Mr. THOMSON. A little bit over 10,000.

NUMBER OF ATF ARRESTS OF VIOLENT OFFENDERS

Mr. HOYER. 10,000 plus. How many arrests of violent offenders did ATF effect last year? Do you know that?

Mr. NOBLE. It is, combined, 22,000-plus, if you take the State and local coupled with what ATF does alone. So I would say over 22,000 combined search warrants.

Mr. HOYER. In other words, when you say 22,000-plus, that is in either individually, as an agency, or in conjunction with other law enforcement agencies, as I understand.

Mr. NOBLE. Right.

Mr. MAGAW. Some of those would be arson, Congressman. There are two or three hundred of those that would be arson.

Mr. HOYER. Okay. Which I would put in the category of "violent crime." I mean obviously we have a lot of deaths, and I have another hat as Chairman of the Fire Service Caucus; and arson, of course, is a growing crime with very low apprehension and conviction rates, unfortunately.

NUMBER OF ATF INJURIES OR DEATHS

How many injuries or deaths of agents in this, the 10,000 or the 22,000 arrests?

Mr. THOMSON. In the last year—some injuries, but no deaths.

Mr. HOYER. Okay. So that this was unique in terms of that. I make those points. I knew the answers to the questions. But I make those points because the sad fact of life is that, if we ask young people to confront violent and sometimes mentally unstable—and, therefore, persons unmindful as normal people are of consequences, which makes them more dangerous—we are going to have people who are going to get hurt and tragically lose their lives.

However, relatively speaking, you have conducted your operations with great safety to your agents.

Mr. Lightfoot.

Mr. LIGHTFOOT. Thank you, Mr. Chairman.

I appreciate your reinforcing what we all know, that you are a good attorney, that you don't ask questions unless you know the answers. That is why you are the Chairman and I am over here.

No, I would just, in closing, really sincerely like to thank all of you, the three of you here today, and everybody else that has put heaven knows how many thousands of hours of work into putting this whole investigation together and report and everything that goes with it.

It is just personal opinion, but to me the men and women in ATF are some of the best trained and most motivated and most dedicated people we have working for the U.S. public. And any organization, you have a bad apple once in a while.

And I think you have identified them here, and they are out of the barrel. And now, with Mr. Magaw, we can start on a new step. And, quite frankly, I have a very high comfort level with the three of you gentlemen that are here today. I think you represent the best in honesty and integrity and desire to get the job done, and that is really what we are all about.

And I compliment the Chairman on this whole process. I think it has been handled very professionally, and I have been proud to have a very small part of it.

Mr. Chairman, thank you very much. And I think if that little blue book can be a learning manual, then it served its purpose.

Mr. HOYER. Thank you, Mr. Lightfoot.

Mr. Noble, anything you want to say in closing?

Mr. NOBLE. Well, again I wanted to just reiterate thanks on behalf of the Secretary of the Treasury for giving us the time and support to do the kind of review that we thought was appropriate.

I would like to thank the agents and the investigators on the review team for suffering through tantrum after tantrum on my part to make sure that your very serious directive—and I know that you made clear before the review, sir, that you wanted it to be independent, comprehensive, and candid. And it was tough to make it happen. But the agents of ATF and the investigative team and this committee combined to make sure the American people will have confidence in us in the future.

We appreciate that.

Mr. HOYER. Mr. Noble you make an observation.

As you know, I had some concerns about your ability to be objective. Although you were not in the decision-making stream in this event, it is clear that you were about to come on board. You hadn't

come on board; you had no authority; you were not involved in this. But I was concerned, and I expressed that to you.

And I expressed to Secretary Benson a strong hope and expectation—a lot of hope and expectation, that the investigation would be objective, candid and tough, I would have used, as opposed to brutal, but either one. Depends I guess on whether you are a subject of the report how brutal you think it is.

We had some people, I don't know I would refer to them as bad apples, frankly, but they made some mistakes. And they compounded those mistakes, which you have talked about. In doing so, they did not serve ATF, they did not serve the U.S. Government; and they did not serve Mr. Willis and Mr. McKeehan and Mr. LeBleu or Mr. Williams. Nor did they serve the country well. And they are suffering the consequences, I think appropriately.

But I don't think that is a happy event either. These are people who, for the most part, gave good and faithful service to their government.

I am proud of this committee. I want to tell—all committee Members aren't here, but we went through two days of hearings. I am pleased that you thought that they were objective. And I was cognizant of two things: number one, that you were going to have this investigation; number two, that we have some criminal investigations and trials that were then pending.

And we did not want to, in any way, undermine or compromise the case that we had against people who would threaten the property and persons and the people that you are sworn to protect and we are sworn to serve. I like to think this committee played some role in doing that.

You said the oversight. Oversight is very important. It is tough to oversee ourselves. I am a lawyer. Tough for the legal community to oversee its bad apples, as you pointed out; tough for the law enforcement to oversee its bad apples, because you get close to one another, you get to be friends, and you get to be more tolerant. Not because you are tolerant of the wrongdoing, but because you are tolerant of the people. You love the sinner, you may hate the sin. The more you love the sinner, the harder it is to hate the sin; or at least to take action on the sin. That may not be a good analogy, but I think all of you understand what I am saying.

In this instance though, as I said, I think you came in with a good report. I think it will serve the interest of ATF, the Treasury Department, and the country. And I thank you for it.

And the tenor of this hearing, which the viewing public is in this instance, which we didn't know was going to be here, I think has been relatively noncritical; it has been noncritical. And the tenor of this hearing would have been substantially different had you not, and the people at ATF not, done the kind of job that you did.

As a result, we can have a hearing, and I am very happy to say that you did a good job of the report. We made some mistakes. We need to correct them. We will never correct all the mistakes, and we will make mistakes again. But to the extent that we have the courage to look at it honestly and keep improving, we will try to minimize the possibility of losing such courageous people as Agent Steve Willis and Agent Tom McKeehan and Agent Conway LeBleu and Agent Robert Williams.

Mr. Magaw, good luck to you; and we look forward to working with you to make ATF a complement to law enforcement in the Federal Government and in this country that we need at a time of heightened challenge.

Thank you very much.

[Questions for the record and the answers thereto follow:]

1. As the Acting Director of BATF in what capacity will you work with both top officials and field agents?

When Secretary Bentsen asked me to take this assignment we discussed his expectations. They were that I would serve as the Bureau's director, working with the management and staff to carry out ATF's important missions as efficiently and effectively as possible.

My appointment is not an interim assignment. The Secretary acceded to my request that my mandatory retirement date be waived so that a clear signal would be sent that I was not taking this assignment for a short term.

2. Have you had an opportunity to evaluate present management control structure within BATF, and if so how do you plan to effectively improve the weak links such as the communication difficulty between management and field agents?

The general management structure of ATF is consistent with the structure of most law enforcement organizations. I have made one immediate change, appointing a full-time deputy director. Previously, the associate directors also dually served as deputies. The full-time deputy allows the associates to focus more fully on their operations and frankly frees my time to focus on learning and evaluating the operations of ATF.

I have also organized a focus group, comprised of representatives from throughout the Bureau - including rank and file. Their mission is to reinvent the Bureau and come forward with recommendations for needed changes. As I testified, we have a lot of hard won experience in ATF and not all of it in management. Communication improves in an organization where everybody is a stakeholder and ideas are sought and valued.

3. Would you summarize for the committee how you intend to restore the confidence of the men and women who work for you and the public which depends on your agency to protect them from individuals like David Koresh?

I have been very favorably impressed by the level of

confidence and the sense of mission I have found at ATF headquarters and in the field divisions and compliance offices I have visited. The last year has been a hard one for the Bureau, but I believe we are beginning to move through that.

I believe the Treasury Review of Waco successfully conveyed the rock solid integrity of the rank and file men and women in ATF to the public. Their day to day hard work and the results of it certainly helps the public put Waco into context.

The primary challenge for ATF, and one we fully intend to meet, is to absorb the lessons we have learned and to go forward. That is my expectation for the Bureau and I believe it is also the public's.

OVERSIGHT RESPONSIBILITY OF BATF HEADQUARTERS

1. A lot of discussion has taken place with regard to the degree of oversight that the Assistant Secretary (Law Enforcement) exercises over the various components within the Department of the Treasury. Less discussion has taken place with regard to the proper level of oversight that should be exercised by BATF Headquarters, over its field offices. Micromanagement would be counterproductive, but some believe that BATF Headquarters exercises insufficient control over and support to its field elements.

-- Do you anticipate any major changes in the way BATF Headquarters relates to its field offices in such areas as support to planning, intelligence collection and analysis, and training?

Some of the people who are concerned about the relationship between Headquarters and field functions work in those offices. These concerns are not particular to ATF, but are one of the constant dilemmas that exist in any agency. I expect to make changes and I expect to make those changes based on the shared input of both Headquarters and field personnel.

My goal is to implement effective changes whether they are major or minor.

-- Is the level of oversight exercised by BATF Headquarters over major operations of its field offices adequate?

I would say that it is better than adequate. Information requirements and approval requirements ensure timely reporting and review. That doesn't mean we cannot and will not look at ways to improve.

-- Have changes been made to the level of oversight as a results in Waco?

-- What are some of these changes?

There should be no question that there is a heightened sense of concern throughout ATF about the potential dangers in all operations. This has resulted in a far more critical review process and naturally results in increased oversight. There is also a naturally higher level of oversight by me as I work to become familiar

with the major cases and operations of the Bureau.

We are carefully reviewing the Waco report and will be making decisions and changes that effect our management oversight. However, it is really too early to report on specific changes at this time.

TRAINING OF SENIOR BATF MANAGERS

The Department of the Treasury review of the raid on the Branch Davidian compound noted several deficiencies with regard to the manner in which the BATF dealt with the media prior to the raid. Much of the criticism related to the lack of media training among senior BATF managers.

1. Do you concur with this particular finding of the report?

I concur that the media was not handled well in Waco as I concur with the conclusion that there were deficiencies on the part of the media that the review noted. I think that there may be a question as to whether or not individuals applied the training they had received.

ATF's media training program is modeled after the program in the Secret Service, so I am familiar with it. In terms of dealing with the media in a variety of situations it is an excellent program.

One area into which our public affairs people in headquarters and the field are looking is the public affairs component of crisis and disaster planning. This meshes with efforts to improve crisis management training generally.

2. Are there any plans underway to correct this training deficiency?

Seen as a component of disaster or crisis management, there certainly is. In September, all of our public affairs personnel were brought together at a conference. One of the items they discussed was obtaining the crisis management plans from major corporations and emergency organizations. That effort is underway now as we seek to develop improved preparation for crisis management.

3. Beyond training, do you believe that the BATF media guidelines should be revised?

At the same conference, the current ATF directive on media relations was discussed. Revisions are being developed at this time.

4. Can you briefly tell the subcommittee what the present BATF guidance is with regard to contact with the media?

ATF policy requires that we operate in as open a posture as possible recognizing that we are a government agency in a free society.

ATF also requires adherence to Department of Justice guidelines. Those guidelines currently prohibit contact with the media concerning future operations. Frankly, the nature of the media probably prohibits a single best answer for all situations. Both we and the Treasury Department are looking at our media guidelines at the current time.

TRAINING, EXPERIENCE, INSTITUTIONAL SUPPORT

One of the major findings of the Department of the Treasury review of the raid on the Branch Davidian compound was that the BATF planners lacked training, experience and institutional support.

1. Do you concur with this finding?

I believe it is important that we recognize that with regard to the Branch Davidian compound no one had the capability to deal with it successfully. The systemic failures that occurred were in systems that had served the involved agencies well in numerous situations that were also large scale and dangerous.

2. What specific steps would you take, or have you taken, to correct these shortcomings?

We are taking the report apart page by page and analyzing its findings. Clearly, if we can prepare for another Waco everything else we do will benefit from that preparedness.

One step I have taken is to ensure that we will not undertake such an operation by ourselves. I don't believe we can develop a one agency response to situations like Waco or that anyone else can. The first rule is to bring in everybody and plan such operations with full access to the special expertise of numerous agencies. That approach is not only better, it is more cost effective.

LAW ENFORCEMENT COUNCIL

The Department of the Treasury Review of the Branch Davidian Raid has noted that the Office of the Assistant Secretary (Law Enforcement) has recently established a Treasury Law Enforcement Council which is comprised of the Directors of the various law enforcement components within Treasury. The Council is said to: (1) Serve as a forum for discussions; (2) develop reporting requirements; and (3) develop crisis management procedures.

1. Can you give the subcomittee some details as to how this council will function?

The council, as I understand it, will function as an advisory body to the Assistant Secretary and will work to develop departmental law enforcement goals, policies and procedures.

The concept of a law enforcement forum at the Departmental level has obvious attractions. It gives each of the agency heads a chance to work in direct support of each other on major issues. It also provides the Assistant Secretary and the agency representatives with access to programs, policy development and issues facing the other agencies.

2. Will you and the various directors actually attend these meetings?

I expect to attend regularly. Obviously, perfect attendance will be an impossibility. However, I would expect the individual acting for me to attend under all but the most unusual circumstances. I see that as having a dual benefit in that it can be an important developmental experience.

3. How often will the council meet?

I don't know that a schedule has been established. I could foresee at least monthly meetings, with the possibility that the council could meet more often depending upon the issues or circumstances.

4. In your view is there any necessity for field participation on this council?

Depending upon the agenda issues, I would not hesitate to recommend participation by knowledgeable field personnel from ATF.

MERGER OF BATF INTO FBI

There has been considerable speculation and some endorsement in the media recently as to the wisdom of merging the responsibilities of various law enforcement agencies. One such suggestion equates to a merger of the enforcement responsibilities of the BATF into the FBI, which Vice President Gore also recommends doing in the National Performance Review Report.

1. What is the status of BATF's examination of the pros and cons of such a merger?

We have looked at the National Performance Review recommendations. While we support the concept of being more efficient and effective and finding more cost effective ways of doing our job, we have a number of concerns about the effectiveness of the proposed merger.

Frankly, we are less concerned with the merger issue since the proposed DEA merger has been cancelled. As you are aware, a merger of ATF functions was only proposed after a successful merger of DEA into the FBI.

2. Can you give the subcommittee a sense of what you perceive to be the strengths and weaknesses of such a merger?

If the Administration and Congress ordered such a merger my responsibility would be to carry it out as effectively as I could.

However, I believe there are serious flaws that have not been fully reviewed in the proposed merger of ATF functions into the IRS and FBI.

I believe that adding the authority of either ATF or DEA into the FBI goes too far toward creating a National Police Agency. As Judge Freeh said in a recent article in the Washington Post, the FBI is already large enough and powerful enough to be concerned about. The separation of authority in our Federal law enforcement community provides a healthy separation of powers that protects individual liberty and provides for someone to be watching the watchers.

As I see it, dividing the law enforcement, regulatory and revenue authority of ATF into two agencies in two departments can only produce inefficiency, waste and duplication. ATF agents and inspectors work together to put bad gun dealers out of business, to ensure the collection of the revenue and to properly control the

explosives industry.

ATF exists because its missions involve both the regulation of legitimate industries and the investigation of crimes involving the products of those industries or illegal duplication or sale of those commodities. The priority of the Federal government's attention to the matters in ATF's jurisdiction is entirely proper and could only be diluted by mixing them into two larger bureaucracies.

Similarly, the sensitivity of ATF's missions make the close oversight by Congress of ATF entirely proper. The oversight of larger multi-mission organizations is much harder.

I personally see the bulk of the National Performance Review's recommendations as recognizing that flexibility and innovation are the keys to a more responsive and efficient government. Those traits are far more likely to occur in a smaller, tightly focused organization than in a larger one.

Finally, as a career Federal law enforcement officer, I am skeptical about the savings that a merger would accomplish. There are likely to be huge personnel and training costs. Savings are more likely in a reasonably competitive arena. Competition based on effectiveness and efficiency is good. What we need to avoid is duplication.

I am sure that if this proposal were to resurface, this Subcommittee will be involved in a key role. I assure you we are ready to work with you in an open manner should that happen.

3. Are you in favor of such a merger?

No, for a number of reasons, some of which I have outlined, I am not.

4. Are your feelings on such a merger in any way influenced by the events that occurred at Waco?

I am concerned that some people may look at Waco as a reason to support this idea without looking at the larger record of ATF or the larger implications of such a merger.

SPECIAL RESPONSE TEAMS (SRT'S)

The BATF has activated its SRT's 433 times over the past 2 fiscal years with great success in resolving a variety of law enforcement situations. The Waco raid has received much criticism and the subsequent review has noted deficiencies, many of which relate to training of the SRT's.

1. What modifications have been made, or are being contemplated, with regard to the course content of SRT training?

As I noted earlier, the failure in Waco was of systems, which as you note, had worked successfully numerous times.

We have extended SRT training by one week and have included integration of hostage negotiating and intelligence into the program. Moreover, we are including detailed contingency planning into a series of small and large tactical problems that are now in the training.

In a larger review, we are looking at the present composition of the SRT's and examining developing joint training with other Treasury tactical functions. The goal is to provide a capability for mutual support and for tactical responses built on getting the input of agencies with specific individual investigative expertise and experience.

2. Has any consideration been given to instituting a formal crisis management course within BATF for senior managers?

We know that we will upgrade our training in this vital area. As I noted earlier, we are looking at the crisis response plans and training of major corporations and public safety agencies as well as those developed by law enforcement agencies.

Optimally, we look to develop a full crisis management plan, supported by training and reinforced through periodic exercises.

3. Has any consideration been given to creating a training program which would emphasize how intelligence operations can be better integrated into the conduct of tactical operations?

Yes. In our expanded SRT training we are now addressing the intelligence role of the forward observers. We are also examining how to expand our intelligence processing and analysis to more directly support tactical operations.

We see it as our responsibility to process and implement the lessons in Waco and to share that openly with the law enforcement community. It is worth noting that the tactical reviewers who worked on the Treasury report noted that ATF went into Waco relying on systems and planning that were in many cases better than usual. We plan to get a lot better and to help others upgrade their readiness through our efforts.

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